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2 & 3 Geo. 6, c. 21 (*Limitation*), s. 2, sub-s. 3; s. 21, sub-s. 1. MOUNTAIN *v.* BERMONDSEY B. C. **Hilbery J. 204**

2 & 3 Geo. 6, c. 44 (*House to House Collections*), s. 2, sub-s. 1; s. 11, sub-s. 1. SWINDON CORPORATION *v.* HERBERT - - **Atkinson J. 198**

2 & 3 Geo. 6, c. 75 (*Compensation* (*Defence*)), s. 2, sub-s. 1 (*d*). RHODES *v.* SECRETARY FOR WAR - **Divl. Ct. 147**

2 & 3 Geo. 6, c. 81 (*National Service* (*Armed Forces*)), s. 14, sub-s. 4. DOWNSBOROUGH AND OTHERS *v.* HUDDERSFIELD INDUSTRIAL SOCIETY **Divl. Ct. 306**

2 & 3 Geo. 6, c. 89 (*Trading with the Enemy*), s. 1. CORNELIUS *v.* BANQUE FRANCO-SERBE - - **Stable J. 29**

—— —— s. 1, sub-s. 2. FIBROSA SOCIÉTÉ ANONYME *v.* FAIRBAIRN LAWSON COMBE BARBOUR, LD. **Tucker J. and C. A. 12**

—— —— s. 1, sub-s. 2 (*a*); s. 2, sub-s. 1 N.V. GEBR. VAN UDENS SCHEEPVAART EN AGENTUUR MAATSCHAPPIJ *v.* SOVFRACHT - **C. A. 222**

3 & 4 Geo. 6, c. 48 (*Finance* (*No.* 2)), s. 25, sub-s. 1. B. MORRIS, LD. *v.* LUNZER **C. A. 356**

3 & 4 Geo. 6, c. 51 (*Allied Forces*), s. 1, sub-s. 1. *In re* AMAND (No. 2) **Divl. Ct. 445**

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4 & 5 Geo. 6, c. 15 (*National Service*), s. 4, sub-s. 2. EVERSFIELD *v.* STORY - - - **Divl. Ct. 437**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

BUTLER ESTATES COMPANY, LIMITED, AND ANOTHER *v.* BEAN AND ANOTHER.

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March 3, 4;
May 9.
C. A.
July 21, 22.

Landlord and tenant—Rent—Recovery—Lease assigned by lessee—Covenant by assignees to pay rent—Subsequent assignment of lease by assignees—Covenant by first assignees assigned by lessee to landlord—Failure of assignees in possession to pay rent—Action by landlord against first assignees on covenant—Competence.

A covenant by the assignee of a lease with the lessee to pay the future rent and observe the covenants on the part of the lessee contained in the lease which is assigned is not a mere covenant of indemnity, but is an absolute covenant, the benefit of which may be assigned by the lessee to the landlord, and the landlord may sue the covenantor thereon though he is no longer possessed of the term and the lessee was a company which has been wound up.

In re Perkins. Poyser v. *Beyfus* [1898] 2 Ch. 182, and *British Union and National Insurance Co.* v. *Rawson* [1916] 2 Ch. 476 applied. *Harris* v. *Boots, Cash Chemists (Southern), Ld.* [1904] 2 Ch. 376, and *Rendall* v. *Morphew* [1914] W. N. 422; 112 L. T. 285, distinguished.

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ACTION tried by Lawrence J. without a jury.

The plaintiffs were the assignees of the reversion of certain premises which their predecessor had leased on June 22, 1928, to Gill & Reigate, Ld., for ninety-nine years at a yearly rent of 3600*l*. On December 5, 1935, Gill & Reigate, Ld., assigned the lease to the defendants, Bean and Riley, who covenanted as follows: "(3.) The purchasers [i.e., the defendants] hereby "jointly and severally covenant with the company as follows: "(*a*) To pay the future rent and observe the covenants on the "part of the lessee contained in the said lease dated June 22, "1928." Gill & Reigate, Ld., covenanted to go into liquidation. On December 7, 1935, notice of the assignment was given to the plaintiffs, and during December, 1935, Gill & Reigate, Ld., went into voluntary liquidation. On January 2, 1936, the plaintiffs claimed by originating summons in the liquidation the sum of 9000*l*. in respect of possible loss of future rent. On January 9, 1936, the defendants assigned the lease to Gill & Reigate (1935), Ld., and on January 16, 1936, they gave notice of that assignment to the plaintiffs. On March 3, 1936, the plaintiffs' claim was refused by the liquidator of Gill & Reigate, Ld. On December 1, 1936, as a result of a compromise all further proceedings on the plaintiffs' originating summons were stayed on terms which included the payment of 530*l*. to the plaintiffs by the company and the assignment, carried out on December 24, 1936, by Gill & Reigate, Ld. and the liquidator of the company to the plaintiffs of the benefit of the covenant entered into by the defendants in the assignment of December 5, 1935. Notice of the assignment of December 24, 1936, was given to the defendants on January 1, 1937. On September 30, 1937, Gill & Reigate, Ld., was wound up. Gill & Reigate (1935), Ld., having failed to pay the quarter's rent due on June 24, 1940, this action was brought against the defendants claiming payment of 900*l*., the amount of the rent due.

Gerald Gardiner for the plaintiffs. The plaintiffs are entitled to recover. The covenant given by the defendants to Gill & Reigate, Ld., is assignable, and assignable to the plaintiffs. It was duly assigned by the liquidator of that company to the plaintiffs and the defendants cannot get rid of their obligations under it by the assignment of the lease to Gill & Reigate (1935), Ld. This case is covered by *In re Perkins*. *Poyser* v. *Beyfus* (1), where the Court of Appeal held that the trustee in bankruptcy of the assignee of a lease could assign to the lessee an indemnity against the covenants in the lease given to the assignee by a further assignee and that the lessee could sue on the covenant so assigned. *In re Perkins* (1) was applied in *British Union and National Insurance Co.* v. *Rawson* (2), where a married woman was held to be capable of assigning to creditors for unpaid calls on shares an agreement to indemnify her in respect thereof entered into by the defendant against whom the creditors were entitled to have the right of indemnity enforced by an order directing payment to themselves. *In re Perkins* (1) was also applied in *Josselson* v. *Borst* (3), where the facts were similar to those in *In re Perkins* (1). It is true that in *Rendall* v. *Morphew* (4) it was held that a covenant of indemnity given to the executors of a mortgagor who had died insolvent by a transferee of the mortgaged property was not capable of assignment, but that case is distinguishable on the ground that the facts are wholly different from those of the present case and on the other grounds on which the case was distinguished from *British Union and National Insurance Co.* v. *Rawson* by Astbury J. and Pickford L.J. therein (5).

Stone and *E. G. H. Beresford* for the defendants. The plaintiffs are not entitled to succeed. On its true construction the covenant on which they sue is a covenant of indemnity, and, indeed, the indemnity is an essential part of such a covenant: *Harris* v. *Boots, Cash Chemists (Southern), Ld.* (6), where it was held that the covenant did not entitle the covenantee to enforce by injunction the specific performance by the covenantor of the negative covenants in the lease which was assigned to the covenantor. [Law of Property Act, 1925, Sch. II., Part IX., was referred to.] It is true that a covenant of indemnity of this nature is assignable: *In re*

(1) [1898] 2 Ch. 182.
(2) [1916] 2 Ch. 476.
(3) [1938] 1 K. B. 723.
(4) [1914] W. N. 422; 112 L. T. 285.
(5) [1916] 2 Ch. 158-160, 483.
(6) [1904] 2 Ch. 376.

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Perkins (1); but it is only assignable to a person who is liable to pay the rent, and the plaintiffs are not so liable. The covenant is designed to protect a person who is under an obligation and it can only be the subject of assignment to such a person. Otherwise, a speculator or other person who had no interest in the property relating to liabilities arising out of which the covenant was given could buy the benefit of such a covenant for what it was worth. Nor does *In re Perkins* (1) deal with the position which arises where, as in the present case, the person indemnified has gone out of existence. When the person indemnified ceases to exist as Gill & Reigate, Ld., has here, so also does the contract of indemnity cease to exist, and it is immaterial how many times it has been assigned. This case is indistinguishable from *Rendall* v. *Morphew* (2), where a covenant of the same effect as that now under consideration was held to be a personal covenant and incapable of assignment, and from *Goldsmid-Montefiore* v. *Cavendish Land Co.* (3). Although in those cases the indemnities were against liability under mortgages the principle is the same. In the latter case, as in this, there was a covenant to indemnify a person who at the moment of indemnity was, or might be, liable to pay, but as that liability never matured the covenant of indemnity ceased to be enforceable. The right of the plaintiffs, if any, is against Gill & Reigate (1935), Ld. The liquidator of Gill & Reigate, Ld. cannot release the assets of that company until he has made provision for the rent. The remedy of such an action as the present is damages for breach of covenant and not the recovery of a debt. The breach of covenant sued on must be committed by the defendants, not against the plaintiffs, but against Gill & Reigate, Ld., whom they had covenanted to indemnify. The plaintiffs can have no better right than Gill & Reigate, Ld., and the only right of action of that company would have been for damages for breach of covenant. Inherent in that position is the need for proof of damage and it has not been shown that the old company suffered any

(1) [1898] 2 Ch. 182.

(2) [1914] W. N. 422; 112 L. T. 285.

(3) Unrep. Bennett J., Dec. 19, 1940.

damage. Further, the action should be for damages since the amount of quarterly payments of rent can always be varied, for instance, by agreement. [Sect. 136 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), was referred to.] *In re Perkins* (1) and *Josselson* v. *Borst. Gliksten, third party* (2) are distinguishable, because in those cases the benefit of the covenant of indemnity was assigned to a person who was liable to pay. In addition, in *In re Perkins* (1) the covenantee was still alive at the time of the action. It is true that in *British Union and National Insurance Co.* v. *Rawson* (3) the assignment of the covenant was to a creditor, but the covenantee was still in existence and liable to pay and the case was not one of landlord and tenant. Even if the foregoing submissions are wrong and the defendants are under some liability, they are entitled to the benefit of the compromise made by the plaintiffs and to credit for the sum of 530*l.* paid to the plaintiffs by Gill & Reigate, Ld., thereunder: *British Dominions General Insurance Co., Ld.* v. *Duder* (4).

Gardiner in reply. This is not a covenant of indemnity. The mere fact that a covenant expresses an obligation to make payments under a contract by a covenantor who is not a party to the contract does not make the covenant one of indemnity. Moreover, this covenant is not in the usual form, the words of indemnity having deliberately been left out. There is no authority for the proposition that a covenant which is assignable at all can be capable of only limited assignment to a certain class of persons. The authorities bear merely on whether a particular covenant is assignable, or whether it cannot be assigned, e.g., on the ground that it is a personal covenant, as in *Rendall* v. *Morphew* (5): see per Pickford L.J. in *British Union and National Insurance Co.* v. *Rawson* (6). It is impossible that the mere fact that Gill & Reigate, Ld., had ceased to exist should release the defendants from liability. *British Union and National Insurance Co.* v. *Rawson* (6) makes it clear that the plaintiffs

(1) [1898] 2 Ch. 182.

(2) [1938] 1 K. B. 723.

(3) [1916] 2 Ch. 476.

(4) [1915] 2 K. B. 394.

(5) [1914] W. N. 422; 112 L. T. 285.

(6) [1916] 2 Ch. 476, 483.

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can recover even though that company has not got to pay anything. *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ld.* (1), is distinguishable as it did not turn on any question relating to liability to pay rent, but merely decided that, where a covenant is in the usual form, the words of indemnity govern the earlier language. *Goldsmid-Montefiore* v. *Cavendish Land Co.* (2) is also distinguishable on the facts.

Cur. adv. vult.

1941. May 9. LAWRENCE J. read the following judgment. This is an action by landlords for rent, but it is brought not against assignees who are in possession but against intermediate assignees who assigned the lease to the assignees who are in possession, and the question is whether the landlords can sue on a covenant by the defendants to pay the rent in an assignment of the lease to which the landlords were not parties but the benefit of which the landlords acquired from the original lessees, a company which had been wound up before the action was brought. [His lordship stated the facts as set out and continued:] The defendants contend that the covenant in the assignment of December 5, 1935, is a mere covenant of indemnity, and that, as Gill & Reigate, Ld., ceased to exist in 1937, before the default, they cannot be called on to pay, the party indemnified never having been called on to pay or having been liable to pay.

In my opinion, the covenant in question is not a mere covenant of indemnity. It is in terms an absolute covenant to pay the rent and observe the covenants of the lease. *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ld.* (1), dealt with a covenant in the usual form containing an express indemnity. It is, I think, clear that such a covenant as the present is assignable: see *In re Perkins* (3); and that it is assignable to the principal creditor: see *British Union and National Insurance Co.* v. *Rawson* (4). The plaintiffs in the present case only gave up their rights against Gill & Reigate, Ld., which was a solvent company, in consideration (inter alia) of the assignment of the benefit of the covenant in question. The present case is, therefore, distinguishable from *Rendall* v. *Morphew* (1), a case which appears to me not to be altogether consistent with the judgment of the Court of Appeal in *British Union and National Insurance Co.* v. *Rawson* (2). *Goldsmid-Montefiore* v. *Cavendish Land Co.* (3) was a case of a covenant of indemnity and the plaintiff had not taken any steps in the bankruptcy then dealt with. It is, therefore, distinguishable.

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(1) [1904] 2 Ch. 376.

(2) Unrep. Bennett J., Dec. 19, 1940.

(3) [1898] 2 Ch. 182.

(4) [1916] 2 Ch. 476.

It is argued for the defendants that, even if liable, they are entitled to credit for the sum of 530*l.* paid to the plaintiffs by Gill & Reigate, Ld., under the compromise, and interest thereon, but, as this sum was not paid as rent, I do not think the defendants are entitled to any credit in respect of it in this action.

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(1) [1914] W. N. 422; 112 L. T. 285.

(2) [1916] 2 Ch. 476.

(3) Unrep. Bennett J., Dec. 19, 1940. In that case the trustee in bankruptcy of a mortgagor for consideration transferred the equity of redemption in the mortgaged premises to the defendants who entered into the following covenant with the trustee: "The said Cavendish Land Co., "Ld. hereby covenants with the "said Henry Holmes as trustee "in bankruptcy of Herbert Rich-"ards [the mortgagor] that it will "pay the principal sums and all "interest henceforth to become "due under the registered charges "affecting the property hereby "transferred and observe and "perform all the covenants and "conditions therein contained and "also will at all times hereafter "save harmless and keep indemni-"fied the said Henry Holmes and "the estate and effects of the said "Herbert Richards from and "against all proceedings costs "claims and expenses on account "of any omission to pay the "principal sums and interest on "any breach of any of the said "covenants and conditions." Bennett J. held, on the construction of the covenant "that it was "nothing more than a covenant "to indemnify." After the discharge of the mortgagor from his bankruptcy and the release of the trustee from his office the defendants failed to pay to the mortgagee interest due under the mortgage deed, and the mortgagee, for consideration, obtained from the official receiver in bankruptcy, in whom, under ss. 53 and 93 of the Bankruptcy Act, 1914, had vested, on the release of the trustee, any property vested in the trustee, the benefit of the covenant entered into by the defendants with the trustee. The action was brought by the mortgagee against the defendants on that covenant. Bennett J., having held that the effect of the covenant was as stated, further held on the facts that the defendants had not broken their promise of indemnity as the trustee whom they had indemnified had never come under liability to the mortgagee-plaintiff, and, therefore, dismissed the action.

There will, therefore, be judgment for the plaintiffs, with costs.

Judgment for plaintiffs.

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From this judgment the defendants appealed.

The appeal was heard on July 21 and 22, 1941.

Roxburgh K.C. and *Stone* for the appellants.

Gerald Gardiner for the respondents.

SCOTT L.J. [having stated the facts, continued :] Mr. Roxburgh, on behalf of the appellants, in a very interesting, careful and forcible argument, submitted that the learned judge had gone wrong both on the main point as to the true meaning of the covenant to pay the future rent contained in the assignment and on the minor point whether, assuming that the learned judge was right on the first point, the amount due for the quarter in question as future rent had not been reduced by the 530*l.* paid by the liquidator in compromise of the claim. I will follow him in dealing with the major point first.

As I see it, the question is purely one of interpretation, whether, as Mr. Roxburgh put it, the words of the covenant in the assignment ought not to be read as modified by a recognized principle of construction of such a covenant that assignees, who have parted with possession, not being parties by privity of estate or contract, so as to be directly liable to the landlords, cannot be held to have intended to guarantee the landlords against a possible loss of rent through their not being able to enforce the liability under the lease for the whole period of the lease, but merely to indemnify the assignors against their liability for the rent. He cited certain cases of which the chief was *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ld.* (1).

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(1) [1904] 2 Ch. 376, 381.

The headnote states the effect of the judgment there given by Warrington J., as he then was: "The true object of the "covenant by the assignee usually inserted in an assignment of "leaseholds is merely to indemnify and protect the lessee "against breach of covenant contained in the lease, and "consequently a lessee is not entitled to enforce by injunction "the specific performance by his assignee of the negative "covenants contained in the original lease by means of the "covenant 'to perform and observe' the covenants and "conditions contained in the lease, and to indemnify the assignor "from and against all claims and demands on account of the "same." The covenant in that case was, no doubt, in the usual form of such a covenant; and it is to be noted that it contains in express language, as a part of the covenant, an undertaking to indemnify. Warrington J. held that that form of covenant is an indemnity, and an indemnity alone. He added, "I think the true object of the covenant entered into "on the assignment of the lease is to indemnify and protect the "original lessee against breaches of covenant contained in the "lease under which he holds." That may well be the case when the covenant is in the usual form, but the covenant in this case is not in the usual form. This covenant contains no reference to indemnity. It is clear in its terms, which expressly put upon the purchasers the obligation to pay the future rent and observe the covenants on the part of the lessee contained in the lease. The burden of satisfying the court that those express words ought to be read by implication as a mere covenant to indemnify is obviously upon the appellants; and I can see no sufficient ground for reading such a contract of indemnity into this very short and definite covenant. It is a very strong thing to imply a term so different from the natural, legal meaning of the words used as would be involved by the conversion of this covenant to pay the future rent due under the lease into a mere covenant to indemnify the lessees against their liability for the rent. The ordinary rule of implication must apply, namely, that no words are to be read in unless they are necessary to give business efficacy to the document and to justify the conclusion that that must have

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been the intention of the parties. In the present case that criterion points to the opposite conclusion. The assignment was a mere step in the reconstruction of the old company, the assignees probably finding the necessary capital for the new company. That it was so made for the express purpose of reconstruction is a necessary inference from the provision that the company undertook to commence the voluntary winding up within two months: and the fact that the company was going to wind up immediately, appears to me of itself a sufficient reason for construing the covenant in question as a covenant meaning just what it says, and for rejecting the argument that it should be read as containing by implication the implied modification. The lease is recited in the assignment; the words of the covenant "the future rent under "the said lease" must, I think, mean what they say, namely, the rent payable under the lease. The question whether, if there were in the future a reduction of rent, the rent payable would be the reduced rent, does not arise on the issue which we have to decide to-day. Equally, the possibility which is put to us of an increased rent under the lease, is a matter that does not arise; although I doubt whether an increase of rent would be covered consistently with the words used.

For those reasons I think that there is no sufficient ground for enlarging or qualifying the words of the covenant in the way contended. It is perfectly true, as Mr. Roxburgh has said, that this covenant by the assignees to pay the rent cannot mean rent in the strict sense of the word, because now that they have assigned the term they are not liable for rent as such; but in the circumstances of the case the meaning is perfectly plain, namely, that they will be responsible to the lessors for the rent reserved in the lease, and undertake to pay it. For those reasons I entirely agree with the judgment of the learned judge on the major point.

On the minor point also I agree with Lawrence J. A sum paid by way of compromise of a claim put forward in the winding up, extending over the whole period of the lease, for damages suffered by reason of the disappearance of the lessee, cannot be regarded as a payment made towards any particular quarter's rent. I, therefore, think that the payment when received by the landlords cannot be treated as having been received in part payment of any rent at all, either present or future.

For those reasons the appeal must be dismissed with costs.

MACKINNON L.J. I agree. I do not think I can usefully add to what has been said.

GODDARD L.J. I agree, and I only wish to say this: Warrington J., as he then was, pointed out in *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ld.* (1), that an assignor was only concerned, when he was parting with the leasehold premises, to obtain an indemnity; that was his interest. In this case it is obvious, from the language used by the parties, that the object of this clause was not to get an indemnity. An indemnity in this case would really have been of no use at all, because this clause which we have to construe, and which on its ordinary and natural meaning is not a clause of indemnity, is found side by side in the same document with a covenant by the assignor to go into liquidation and to disappear. I think that it would be a very strong thing in any case to read this covenant as a covenant to indemnify, because it does not say so. When you find that it exists side by side with a covenant by the person who would ordinarily be the person to be indemnified that that person should be put an end to, and disappear, it is obvious that you cannot read it as a covenant of indemnity or as anything except what the plain words appear to indicate, namely, a covenant to pay the rent.

On the other part of the case I only have to say this. It seems to me that the money which was paid was money which the landlords were entitled to receive as compensation for the fact that they would no longer have a lessee to look to. That is the reason, I think, which underlies the decision in *James Smith & Sons* (*Norwood*), *Ld.* v. *Goodman* (2). Ordinarily speaking, they would be entitled throughout the length of the currency of the lease to look not only to whatever sitting tenant there might be in possession with whom they would have

(1) [1904] 2 Ch. 376.

(2) [1936] Ch. 216.

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privity of estate, but also to the lessees or their representative, with whom they had privity of contract. As the lessee is going into liquidation, the company are entitled, under the authority of these cases, to prove in the liquidation for a sum of money which has to be calculated according to the value of what the landlord is really losing, his right to look to the lessee. I cannot think that this 530*l*. can be regarded as being paid as rent; it was really paid as compensation for losing the right to look to the lessee. Consequently the defendants are not entitled to any credit in respect of it.

Appeal dismissed.
Leave to appeal further.

Solicitors for appellants (defendants): *Preston, Lane-Claypon & O'Kelly, for Ansell & Sherwin, Birmingham.*

Solicitors for respondents (plaintiffs): *R. C. Bartlett & Co.*

A. W. G.

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K. B. D.
Mar. 6, 7.

C. A.
May 5, 6, 15.

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Emergency legislation—Trading with the enemy—Frustration—Contract for sale of goods between companies of friendly nationality—War—Port of delivery occupied by enemy—Contract frustrated—Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 1, *sub-s.* 2.

By a contract in writing dated July 12, 1939, the defendants agreed to sell and the plaintiffs to purchase certain machinery for the sum of 4800*l*. of which one-third was to be paid with the order. Delivery was to be three to four months from settlement of final details and the goods were to be packed and delivered c.i.f. Gdynia, Poland. The sale was made subject to certain conditions and cl. 7 was as follows: "Should dispatch be "hindered or delayed . . . . by any cause whatsoever beyond "our reasonable control, including . . . . war . . . . a reasonable extension of time shall be granted." Only 1000*l*. out of the sum of 1600*l*. to be paid with the order was in fact paid. On September 1,

(1) The plaintiff's real name was Fibrosa Spolka Akcyjina and by direction of the Court of Appeal the plaintiff's name was so amended in the Record.

1939, war broke out between Germany and Poland and on September 3, Great Britain declared war on Germany. On and after September 23, Gdynia was occupied by the Germans:—

Held, by Tucker J. and the Court of Appeal, (1.) that having regard to the provisions of the Trading with the Enemy Act, 1939 (1), the contract had been frustrated, notwithstanding cl. 7 of the conditions of sale, since that clause must be construed as providing for an extention of time only when war had produced a minor delay and the war in this case was not of that character;

(2.) that in view of the rigour of the obligations of a c.i.f. contract, the provision for delivery c.i.f. Gdynia could not be waived by the plaintiffs;

(3.) that the plaintiffs could not recover their payment of 1000*l.* in view of the decision in *Chandler* v. *Webster* [1904] 1 K. B. 493, a case binding on the Court of Appeal as well as on a judge of first instance.

ACTION tried by Tucker J.

The following statement of the facts is taken from the judgment delivered by MacKinnon L.J. in the Court of Appeal. The plaintiffs were a corporation incorporated under the laws of Poland. The defendants were manufacturers of textile machinery at Leeds. By an agreement in writing dated July 12, 1939, the defendants agreed to manufacture for and supply to the plaintiffs two sets of hackling machines for flax at a total cost of 4800*l.* The material parts of the contract were as follows: (1.) Terms of payment. Net by cheques on London, one-third with the order (that is, 1600*l.*), balance against shipping documents. (2.) Delivery three to four months from

(1) The Trading with the Enemy Act, 1939, s. 1, sub-s. 2: "For the purposes of this Act a "person shall be deemed to have "traded with the enemy—

"(*a*) if he has had any "commercial, financial or "other intercourse or dealings "with or for the benefit of, an "enemy, and, in particular, "but without prejudice to the "generality of the foregoing "provision, if he has—(i.) supplied any goods to or for the "benefit of an enemy, or obtained any goods from an "enemy, or traded in, or carried, any goods consigned to "or from an enemy or destined "for or coming from enemy "territory."

Sect. 15: "In this Act the "following expressions have the "meanings hereby respectively "assigned to them:—'enemy "'territory' means any area "which is under the sovereignty "of, or in the occupation of, a "Power with whom His Majesty "is at war, not being an area in "the occupation of His Majesty "or of a Power allied with His "Majesty."

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settlement of final details. (3.) Packed and delivered c.i.f. Gdynia. (4.) Including the services of a skilled *monteur* to superintend erection (presumably at Wilno). (5.) Subject to conditions of sale as per sheet attached hereto. Of these conditions the only material one was cl. 7, which provided: "Should dispatch be hindered or delayed by . . . . any cause "whatsoever beyond our reasonable control, including . . . . "war . . . . a reasonable extension of time shall be granted." Clause 15 provided that the contract should operate as a British contract and in conformity with British law. On July 18, 1939, the plaintiffs paid 1000*l.* to the defendants' agents as part of the 1600*l.* due under the contract. The remaining 600*l.* was never paid by the plaintiffs. On August 11, the defendants' agents wrote to the plaintiffs' agents reminding them that the 600*l.* was due and should be paid.

At the end of August, 1939, Germany invaded Poland. On September 7, the plaintiffs' agents wrote to the defendants' agents: "Owing to the outbreak of hostilities, it is now "quite evident that the delivery of the hackling machines on "order for Poland cannot take place. Under the circumstances "we shall be obliged if you will kindly arrange to return our "initial payment of 1000*l.* at your early convenience." Next day the defendants' agents replied: "Considerable work has "been done upon these machines and we cannot consent to "the return of this payment. After the war the matter can "be reconsidered." On November 13, solicitors for the plaintiffs wrote to ask for "detailed particulars of the considerable work you allege has been done on these machines." On December 1, solicitors for the defendants replied that two of the machines had been completed before the war, and they went on to say that the defendants could sell all the machinery, leaving them with no loss "arising from the non-performance "of this contract," and asked the plaintiffs to concur in that disposal. Whether that proposal involved the return of the 1000*l.* was not made clear, but the court formed the opinion that it did not. On December 15, the defendants' solicitors wrote that, in the absence of further communication from the plaintiffs, the defendants had had to make their own decision, that the contract had been dissolved by frustration on the outbreak of the war, and that, under the principle laid down by *Chandler* v. *Webster* (1) the plaintiffs were liable to pay the balance of the 1600*l.* not yet paid.

Abortive discussions between the parties ensued. On February 8, 1940, the plaintiffs' solicitors wrote saying that the factory for which the machines were bought was at Wilno, in Lithuania, a neutral country, and that delivery c.i.f. Gdynia was only a convenient method and not of the essence of the contract and could be varied by delivery and erection at Wilno. The letter concluded: "Our clients recognize that "under the present circumstances there may be a certain "amount of delay . . . . but they must insist upon the "terms of the contract being carried out, and the delivery of "the machines to Wilno at as early a date as possible under the "circumstances." Nothing was said about the 600*l.* which ought to have been paid by the plaintiffs in July, 1939, nor about how or when the rest of the 4800*l.* was to be paid, nor about the extra expense of delivery at Wilno. On February 13 the defendants' solicitors replied that the points raised did not seem to affect the legal position and "we must, therefore, "leave your clients to take such steps as they may be advised."

On May 1, 1940, the writ in this action was issued. In it the plaintiffs claimed: (*a*) specific performance of the contract of July 12, 1939; (*b*) alternatively, return of the 1000*l.*; (*c*) further or other relief. The statement of claim, dated August 5, 1940, alleged that the defendants had broken the contract by refusing to deliver the machines, while "the plaintiffs are and "have at all material times been ready and willing to take "delivery and pay for the machines," that the plaintiffs had paid the 1000*l.*, and that the defendants claimed to retain it. The prayer of the claim was (*a*) for damages for breach of contract; (*b*) for specific performance of the contract, or, alternatively, the return of the 1000*l.*; and (*c*) further or other relief. The defence, dated August 26, 1940, alleged in effect that the contract had been frustrated by reason of the

(1) [1904] 1 K. B. 493.

German invasion of Poland and the German occupation of Gdynia on September 23, 1939. On February 27, 1941, the plaintiffs delivered a reply in which they alleged: "that "since September, 1939, the plaintiffs have at divers times "stated and have at all times been ready and willing to take "delivery of the said machinery in England."

The material facts were admitted at the hearing of the action, and it was agreed that, before December 15, 1939, the plaintiffs had expressed their willingness to accept delivery of the goods at Riga or Leeds.

Sebag Shaw for the plaintiffs referred to *Maine Spinning Co.* v. *Sutcliffe & Co.* (1); *Wackerbarth* v. *Masson* (2); *Chandler* v. *Webster* (3); and *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (4).

G. O. Slade for the defendants referred to *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (5); *Geipel* v. *Smith* (6); *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (7); *Wackerbarth* v. *Masson* (2); and *Maine Spinning Co.* v. *Sutcliffe & Co.* (1).

TUCKER J. The plaintiff company alleges that a contract in writing dated July 12, 1939, has been broken by the defendants and claims the usual forms of relief, in the alternative, in respect of the defendants' alleged failure to perform it, namely, damages or, alternatively, specific performance, and further or other relief. Mr. Shaw on their behalf puts forward a claim asking for a declaration, and there is also a claim for the return of 1000*l.* paid under the contract. Mr. Shaw admits that if he can get back his 1000*l.*, and if I think the proper remedy is damages, then the damages which he claims in addition to the 1000*l.* would be only nominal.

The material facts necessary for the purpose of enabling me to decide the main issue of the case have been admitted or agreed.

(1) (1917) 34 Times L. R. 154.
(2) (1812) 3 Camp. 270.
(3) [1904] 1 K. B. 493.
(4) [1924] A. C. 226, 241, 247, 257-9.
(5) [1918] A. C. 119.
(6) (1872) L. R. 7 Q. B. 404.
(7) [1918] A. C. 260.

[His Lordship stated them, and continued :]

Now the point taken for the defendants is that this contract has been frustrated, to use the word that is applied to cases of this kind, and before considering that point I should refer to one, at any rate, of the conditions of sale which formed part of the contract between the parties. [His Lordship read cl. 7.]

This contract having been made, on September 1, 1939, war broke out between Poland and Germany, and on September 3 between Great Britain and Germany. Therefore the position was that the plaintiff company in Poland and the defendant company in England found their countries at war with a common enemy, namely, Germany, and on September 5, 1939, the Trading with the Enemy Act, 1939, was passed. On September 23, 1939, Gdynia was occupied by the enemy, and has remained ever since in his occupation.

It is said by Mr. Slade, on behalf of the defendants, that this contract became frustrated, in the first instance, I think, merely by the occurrence of the outbreak of war, but, whether or not he is right about that, he says that at any rate it became frustrated from the moment that the Trading with the Enemy Act was passed, or from the moment that Gdynia was occupied by the enemy, and the joint effect of the passing of the Trading with the Enemy Act and the occupation of Gdynia by the enemy was the frustration of this contract. Mr. Shaw, on behalf of the plaintiffs, says that that is not so, and that this is a case where the parties have, by the contract, provided for the precise events that have happened, and that by the contract they have expressly provided that in the case of war the contract shall be suspended for a reasonable time. Having regard to the fact that this is a contract made between the subjects of friendly and allied countries, I do not think that the mere outbreak of war between Great Britain and Germany had the effect of frustrating this particular contract. I think, if it is necessary to decide this question, that until Gdynia became occupied by the enemy cl. 7 would have applied and that the contract, or the performance of the contract, would have been suspended for a reasonable time.

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But in my view that is not essential for the decision of this case, because I have come to the conclusion that from the moment that Gdynia was occupied by the enemy the contract became frustrated by reason of the provision in the Trading with the Enemy Act to which I have referred. I think that to have attempted to carry out this contract would involve a breach of that Act, and the defendants would have been trading in or carrying goods destined for enemy territory if they had performed their obligation under the contract. That is not conclusive, because Mr. Shaw I think agrees that the mere delivery of the goods in Gdynia would have been a breach of that clause, but he says that even if that is so, it does not follow that the contract has been frustrated, and that as long as the defendants do not actually deliver in Gdynia the contract still continues, although it is in a state of suspension.

I think that this case is governed by a number of cases, such as the *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (1), and is more like the *Dick Kerr* case (1) than some of the others, because it is a case where, as I have already said, the parties are subjects of friendly and allied countries, and it is not a case where one of the parties is the subject of a country at war with this country, namely Germany. *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (1), was the case of a contract between two parties in this country, and what was relied upon there as bringing about frustration was the giving of a notice by the Minister of Munitions, in the exercise of his powers under regulations, requiring the work on the contract to cease, and it is to be observed that in that case Lord Finlay L.C., in the course of his speech, said (2): "It was not disputed, as I understand the argument for the "appellants, that in the case of a commercial contract, as for "the sale of goods or agency, such a prohibition would have "brought it to an end. It was sought to distinguish the "present case on the ground that the contract was for the "construction of works of a permanent character, which "would last for a very long time, and that a delay, even of

(1) [1918] A. C. 119.

(2) Ibid. 126.

"years, might be disregarded." Then he points out why he does not agree with that contention.

In another case reported in the same volume, *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (1), it is to be observed that Lord Dunedin dealt (2) with the position if a contract of the kind with which he was dealing was held to be suspended for the duration of the war. He said: "Let me now apply this "rule to clause 15 on the hypothesis that it does suspend "delivery during the war. But for it the contract would "immediately end, by it the contract is kept alive, and that "not for the purpose of making good rights already accrued "but for the purpose of securing rights in the future by the "maintenance of the commercial relation in the present. It "hampers the trade of the British subject, and through him "the resources of the kingdom. For he cannot, in view of the "certainly impending liability to deliver (for the war cannot "last for ever), have a free hand as he otherwise would. He "must either keep a certain large stock undisposed of and "thus unavailable for the needs of the kingdom, or, if he sells "the whole of the present stock, he cannot sell forward, as he "would be able to do if he had not the large demand under "the contract impending. It increases the resources of the "enemy, for if the enemy knows that he is contractually sure "of getting the supply as soon as the war is over, that not "only allows him to denude himself of present stocks, but it "represents a present value which may be realized by means "of assignation to neutral countries." I think that this, which is a commercial contract, was clearly frustrated directly Gdynia came into enemy occupation, and that it was not merely suspended under the provisions of clause 7 of the conditions. But Mr. Shaw has a further argument which he puts forward to resist the consequences of frustration. He says that the insertion of c.i.f. Gdynia as the place of delivery was merely for the benefit of his clients and that they are entitled to waive that, and that before any repudiation they did waive that requirement and informed the defendants that they were willing to take delivery either at Riga or in

(1) [1918] A. C. 260.

(2) Ibid. 275.

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Leeds, and that if they are entitled to do that and hold the defendants in other respects to the contract, then no question of the infringement of the Trading with the Enemy Act arises. Mr. Slade's answer to that argument is that the insertion in the contract of the place of delivery is not a matter put in solely for the benefit of the purchaser, which he can waive if he thinks fit, but is a term of the contract upon which the vendor is entitled to insist if he so desires, and he relies upon the case of *Maine Spinning Co.* v. *Sutcliffe & Co.* (1), a decision of Bailhache J. The head-note of that case is: "In January, 1915, the defendants, an English company, sold "to the plaintiffs, an American company, a quantity of woollen "tops. The contract contained the following clauses: 'This "'order is taken subject to the embargo being removed, and "'your affidavits being accepted,' and 'Delivery Liverpool, "'England.' In the communications leading up to the "contract the expression 'f.o.b. Liverpool' had been used. "There was at the time of the contract an embargo against "the export of wool from the United Kingdom except under "licence, and the course of business was for the defendants to "obtain such licence, though they were under no obligation "to do so. The defendants, having failed to obtain the "necessary licence, did not deliver a portion of the stipulated "quantity, and the plaintiffs brought an action against them "for damages and contended that they had an option to require "delivery in England in lieu of shipment. *Held*: that in "the circumstances 'Delivery Liverpool' meant 'Delivery "'f.o.b. Liverpool,' and the buyers were not entitled to claim "delivery at Liverpool without the goods having been put "on board ship, and therefore the action failed." In the course of his judgment Bailhache J. said: "Mr. Schwabe "then said that it was open to the buyers to waive one of the "terms of the contract, and to claim delivery of the goods at "Liverpool without their having been put on board ship. "That, however, was a mistaken view of the law. If a term "of a contract was entirely for the benefit of one party to the "contract it was open to that party to waive the benefit of

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(1) 34 Times L. R. 154.

"such condition. But a term in a contract as to the mode of "delivery was not inserted wholly for the benefit of one party "to the contract, and it could not be waived by one party to "the contract without the consent of the other party," and he referred to two cases, one of which is *Wackerbarth* v. *Masson* (1), That is a decision of Lord Ellenborough in the year 1812, and the head-note to that case reads: "Where in a contract "for the sale of sugar, there is the following term: 'free "'on board a foreign ship,' the seller is not bound to deliver "it into the hands of the purchaser, or to transfer it into "his name in the books of the warehouse where it lies, but "only to put it on board a foreign ship, which it is the duty "of the purchaser to name." In his judgment Lord Ellenborough says: "The delivery for which the plaintiff "undertook was—on board a ship to be named by the "defendant. He was always ready to deliver the sugars in "this manner and he offered to do so. But the defendant "requires a tertium quid. Instead of naming a ship, he "demanded to have the sugars weighed off and delivered into "his own hands, or transferred to his own name in the warehouse-keeper's books. The seller might have been exposed "to some risk, or might have lost some advantage by agreeing "to this; and he had a right to refuse, as it was not the mode of "delivery for which he had stipulated. The defendant is, "therefore, liable for a breach of the contract in afterwards "refusing to accept and pay for the goods." Now if that is the position with regard to an f.o.b. contract, I think it certainly must be so with regard to a c.i.f. contract.

Mr. Shaw seeks to distinguish this case by saying that it is in fact a c.i.f. and not an f.o.b. contract, and he furthermore invites me not to follow those two cases. I hope that I am not lacking in my share of judicial courage, but I confess that when I am invited not to follow a decision of Lord Ellenborough in the year 1812, and furthermore a decision on a matter of this kind by Bailhache J., my courage fails me, and I do follow and accept their decisions. As I say, if that is the law in regard to a f.o.b. contract, it certainly must be the law in regard to a c.i.f. contract.

(1) 3 Camp. 270.

With regard to the 1000*l.* that has already been paid, Mr. Shaw seeks a return of that, and he agrees that if the contract has been frustrated he cannot get it back so long as *Chandler* v. *Webster* (1) remains the law of England, but he formally takes the point before me in order to preserve his position before a higher tribunal. I merely mention the point, therefore, and say that *Chandler* v. *Webster* (1) is binding upon me, and under the law there laid down, this contract having been frustrated as I find, it is impossible for the plaintiffs to recover the 1000*l.* paid under the contract before the frustration took place.

The result is that there must be judgment for the defendants, with costs.

Judgment for defendants.

The plaintiffs appealed.

Linton Thorp K.C. and *Sebag Shaw* for the plaintiffs. Tucker J. was wrong. The contract specifically provides for a "reasonable extension of time" should there be war. That expression means an extension that is reasonable when the facts (i.e., the length of the war) are known. The parties, therefore, have contracted by apt words for their rights and liabilities in the events which have happened. In face of that, there is no justification for the finding that the contract was frustrated and the plaintiffs are entitled to a declaration that the contract is still subsisting and that the defendants must give a reasonable extension of time. [They referred to *Spence* v. *Chodwick* (2).] *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (3) is distinguishable, there being no express war clause and the machinery having been dispersed and sold. In that case, too, there was a measure of value. Here, there is a fixed purchase price. In *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (4), Lord Parker stated that there was underlying all cases in which a contract had been held to determine on the happening of an event which rendered performance impossible, or otherwise frustrated

(1) [1904] 1 K. B. 493.
(2) (1847) 10 Q. B. 517.
(3) [1918] A. C. 119.
(4) [1916] 2 A. C. 397, 409, 422.

the objects of the parties, a principle of contract law which depended on a term or condition to be implied in the contract itself but that it was impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered therefrom. The parties here have expressly provided for the event of war and there is no room for implication giving rise to frustration. In *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (1), Lord Dunedin concluded that the suspensory clause, which kept the contract alive to secure rights in the future by maintaining commercial relations in the present, was void as being against public policy, but in the present case, the suspensory clause is not contrary to public policy because the contract does not contemplate delivery of machinery to any enemy subject. Tucker J. held that the contract came to an end on the occupation of Gdynia by the German forces, and he based that decision on s. 1, sub-s. 2, and s. 15 of the Trading with the Enemy Act, 1939. That Act, however, is not retrospective. It does not provide that contracts already entered into shall be annulled. Moreover, the provision in the contract for delivery at Gdynia was purely for the benefit of the plaintiffs and can be waived by them, and they waived it when they expressed their willingness to accept delivery at Riga or Leeds. *Maine Spinning Company* v. *Sutcliffe & Co.* (2) where a contrary rule was laid down, was a case of an f.o.b. and not a c.i.f. contract, and is, therefore, distinguishable. If the contract is held to be frustrated, the plaintiffs ought to be repaid the sum of 1000*l.* paid by them on account of the price of the machinery. It may be, however, that this court will feel bound by the decision in *Chandler* v. *Webster* (3) to the contrary. [They also referred to s. 10 of the Sale of Goods Act, 1893.]

G. O. Slade for the defendants. Tucker J. was right. The contract was frustrated. Frustration operates independently of the intention of the parties. The fact that an express term in the contract appears to provide for the actual occurrence leading to the frustration in no way prevents there being

(1) [1918] A. C. 260, 275.
(2) 34 Times L. R. 154.
(3) [1904] 1 K. B. 493.

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read into the contract the implied term the existence of which is the basis of the doctrine of frustration. War is so uncertain, and its duration of such a nature, that it inevitably causes frustration of a contract: *Geipel* v. *Smith* (1) per Lush J. [He referred to *W. J. Tatem, Ld.* v. *Gamboa* (2) and *Court Line, Ld.* v. *Dant and Russell, Inc.* (3).] The position in the present case crystallized when Gdynia fell into enemy hands on September 23, 1939, and nothing which happened afterwards could have any legal effect in preventing frustration. The contract was then dissolved by operation of law. That frustration does not depend on the intention, opinion or even knowledge of the parties is established by *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (4). Even where the contract seems to have provided expressly for what has happened in wide terms, it does not prevent frustration by the operation of law. *Bank Line, Ld.* v. *Arthur Capel & Co.* (5); *W. J. Tatem, Ld.* v. *Gamboa* (6). When the language of cl. 7 of the conditions of sale is considered, it is seen to be very far from providing for such a position as has arisen here. It is true the word "war" occurs, but it is obviously inserted for the protection of the defendants in case, owing to one of the circumstances mentioned, they are unable to effect delivery punctually. It cannot be relied on to give an indefinite extension of time and compel the defendants to store the completed machines for delivery after the war, or, alternatively, to compel them to make new machines at the end of the war when prices of materials may be at a prohibitive level.

With regard to waiver by the plaintiffs of the provision in the contract relating to the place of delivery, it is suggested that some distinction arises from the fact that this is a c.i.f. and not an f.o.b. contract. [MacKinnon L.J. We need not trouble you on that point.]

Assuming that there is frustration, the plaintiffs cannot recover the sum of 1000*l.* already paid: *Chandler* v. *Webster* (3). On any footing regard would have to be had to the expenses

(1) L. R. 7 Q. B. 404, 414.
(2) [1939] 1 K. B. 132.
(3) [1939] 3 All E. R. 314.
(4) [1926] A. C. 497, 509.
(5) [1919] A. C. 435.
(6) [1904] 1 K. B. 493.

already incurred by the defendants towards fulfilling the contract. [MACKINNON L.J. Under Scottish law it has, I think, been held that in a case of frustration a sum paid in advance must be repaid subject to the cost of such work as had already been done.] Yes. A case in point is *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co.* (1), but it is not the first time that English and Scottish law have differed.

Thorp K.C. replied.

Cur. adv. vult.

May 15. MACKINNON L.J. read the judgment of the Court (MACKINNON and LUXMOORE L.JJ., and STABLE J.), in which he stated the facts as set out above, and continued: Tucker J. entered judgment for the defendants. The claim for specific performance was obviously a hopeless one. The plaintiffs were in breach as to the payment of the 600*l.*, and that fact alone would be sufficient to debar any claim for specific performance against the defendants. There remained (1.) the claim for damages for breach of contract, and (2.), alternatively, the claim for the return of the 1000*l.* The judge held (1.) there was no breach of contract by the defendants, the contract having been terminated by frustration in September, 1939; and (2.) that, under the doctrine of *Chandler* v. *Webster* (2), the plaintiffs could have no claim for the return of the 1000*l.* (Logically, on that, if the defendants had put in a counterclaim they might have had judgment against the plaintiffs for the 600*l.*, but there was no such counterclaim.)

We think that the judge was right in his decision. It was argued that there could be no frustration by reason of the German-Polish War because cl. 7 of the contract provided that, should dispatch be delayed by (inter alia) war, "a "reasonable extension of time shall be granted." There cannot, it was said, be frustration by an implied term of the contract when its terms have expressly provided for the contingency that is said to have caused the frustration. This seems to be the argument that was unsuccessfully urged in

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(1) [1924] A. C. 226.

(2) [1904] 1 K. B. 493.

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several cases, notably in *Bank Line, Ld.* v. *Arthur Capel & Co.* (1), and more recently in *W. J. Tatem, Ld.* v. *Gamboa* (2). Indeed, its unsoundness is implicit in the much earlier decision of *Jackson* v. *Union Marine Insurance Co., Ld.* (3). In the charter-party there in question there was an exception of perils of the seas (see the report in the court of first instance (4)), but none the less the contract was held to have been terminated by an overwhelming disaster within that category. In this case the parties provide for an extension of time if war produces a minor delay so as to require "a reasonable extension." Clearly in this case the war and its effect were not of that character, and a war in which the countries of both contracting parties are engaged, even as allies, is not likely to be of that character. As was said by Lush J. in a well known passage: "A state of war must be presumed to be likely to continue so "long, and so to disturb the commerce of merchants, as to "defeat and destroy the object of a commercial adventure "like this." (*Geipel* v. *Smith* (5).) Therefore, we think that the judge was clearly right in holding that, despite the reference to war in this contract, it was terminated by frustration in September, 1939. In other words, the plaintiffs were right in the view they expressed in their letter of September 7: "Owing to the outbreak of hostilities it is now evident "that the delivery of the machines for Poland cannot "take place."

The next contention of the plaintiffs was that, although the defendants could not perform the contract according to its agreed terms, they could effect delivery of the machines to the plaintiffs in a different manner, either by shipment to Riga, or, as is suggested in para. 3 of the reply, by handing them to the plaintiffs at Leeds. This involves the proposition that, if a contractor is relieved from the obligations of his contract, but in such circumstances that he can take some action which will confer the same benefit on the other contractor as performance of the actual contract, he is bound to

(1) [1919] A. C. 435.
(2) [1939] 1 K. B. 132.
(3) (1874) L. R. 10 C. P. 125.
(4) (1873) L. R. 8 C. P. 572, 584.
(5) L. R. 7 Q. B. 404, 414.

take that other action, and is liable for damages for failure to do so. This appears to be a quite impossible proposition, and it is so completely unfounded that it is not worth discussion at any length. This is a c.i.f. contract, and the rigour of the obligations of such a contract is well settled. If a man sells c.i.f. June shipment, and he tenders a bill of lading dated in July, the buyer can treat the contract as broken, and it is in vain for the seller to say that the goods are just as good as they would be if shipped a week earlier. Conversely, if an embargo or prohibition prevented shipment abroad, the buyer could not possibly say: "You can buy these goods in this country, and "deliver them to me here, and if you do not carry out that "different obligation I can claim damages."

Finally, there is the claim for the return of the 1000*l.* Tucker J. held that having regard to the principle laid down in *Chandler* v. *Webster* (1), and other like cases, this claim must fail. We think he was right, and further that that principle must equally bind this court to reject the claim. Whether the principle can be overruled is a matter that can only concern the House of Lords.

Incidentally we may say that the doctrine of frustration by virtue of an implied term in the contract is a modern exposition of the law. Probably, it was first clearly enunciated in *Taylor* v. *Caldwell* (2) in 1863, when the court recognized the existence of an implied term, of which earlier judges (notably Lord Ellenborough in *Atkinson* v. *Ritchie* (3) in 1809) had denied the possibility. If the rule, so discovered or enunciated in 1863, had added as part of the implied term a provision that a party to the contract who, by part performance, had received a benefit should compensate the other for that benefit, it might well have been thought a reasonable addition. It is not without interest to observe that this was the unsuccessful argument for the defendants in the *Teutonia* (4). One may suspect that it may have been suggested by the very learned junior counsel for the defendants.

The Scottish law as laid down in *Cantiare San Rocco S.A.*

(1) [1904] 1 K. B. 493.
(2) (1863) 3 B. & S. 826.
(3) (1809) 10 East. 530.
(4) (1871) L. R. 3 Ad. & Ecc. 394, 405.

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v. *Clyde Shipbuilding Co.* (1) differs from the English law as laid down in *Chandler* v. *Webster* (2). If the House of Lords should hold that *Chandler* v. *Webster* (2) was wrongly decided, and the English law is in truth the same as the Scottish law, it, of course, does not follow that the plaintiffs can claim the whole 1000*l*. In the *Cantiare* case (1) the party who had paid the first instalment was held entitled to recover it "subject "to such counterclaim as might be established for work done "under the contract," and Lord Birkenhead (3) indicates as the principle that the recipient of the money must return it to the amount by which he had in fact been enriched by it. We know nothing of the work done by the defendants on these machines, or how they disposed of them, or to what extent the 1000*l*. has been a pure windfall to them. If the House of Lords should find themselves able to overrule *Chandler* v. *Webster* (2) and substitute a rule like the more civilized rule of Roman and Scottish law, presumably some inquiry will be necessary to determine how much, if anything, of the 1000*l*. the defendants ought to restore to the plaintiffs. So far as we are concerned, however, these are academic considerations. And it is only open to us to say that this appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *A. Kramer & Co.*

Solicitors for defendants: *Maxwell, Batley & Co., for Simpson, Curtis & Burrill, Leeds.*

(1) [1924] A. C. 226.
(2) [1904] 1 K. B. 493.
(3) [1924] A. C. 235.

H. C. G.

CORNELIUS *v.* BANQUE FRANCO-SERBE.

1941
June 24.

Bills of exchange—Trading with the enemy—Cheque payable in enemy occupied country—Presentment of cheque impossible and illegal—Dispensation of presentment—Claim by holder against drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 46, *sub-s.* 2 (*a*)—*Trading with the Enemy Act*, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 1.

By s. 45 of the Bills of Exchange Act, 1882: "Subject to the "provisions of this Act a bill must be duly presented for payment. "If it be not so presented the drawer and indorsers shall be "discharged."

By s. 46, sub-s. 2: "Presentment for payment is dispensed "with,—(*a*) where, after the exercise of reasonable diligence "presentment, as required by this Act, cannot be effected."

The plaintiff received from the defendants, a Belgrade bank, a cheque drawn on an Amsterdam bank in payment for goods sold by the plaintiff to a Yugo-Slavian firm. On or about the day when the plaintiff received the cheque the Germans invaded Holland, and shortly afterwards Holland was proclaimed by the British government to be enemy-occupied territory. It, therefore, became both physically impossible and, under the Trading with the Enemy Act, 1939, s. 1, illegal for the plaintiff to present the cheque for payment at the Amsterdam bank, and he sued the defendant bank on the cheque. The defendants contended that the fact that the presentment of the cheque had become illegal precluded the plaintiff from suing on the cheque:—

Held, that the effect of s. 46, sub-s. 2 (*a*), of the Bills of Exchange Act, 1882, being to dispense with presentment for payment where, after exercising reasonable diligence, the holder of the bill was unable to effect presentment and to leave him at liberty to recover the amount of the bill from the drawer, the fact that the presentment of the bill at the place indicated therein had become illegal did not deprive the holder of his right so to recover.

ACTION tried by Stable J.

The plaintiff contracted with a firm in Yugo-Slavia for the sale to them of eleven and a half tons of crude Java coconut oil which was duly delivered. Payment was required, by a regulation of the British Treasury, to be made in Dutch guilders, and on or about May 10, 1940, the plaintiff received in payment for the oil a cheque for 2989.30 Dutch guilders, dated May 30, 1940, and drawn in his favour by the defendants, a French bank carrying on business in Belgrade, on a bank at Amsterdam. On May 10, 1940, the Germans invaded Holland, and on May 21 a notice in the London Gazette stated that Holland had been declared by the British Government to be enemy-occupied territory. It, therefore, became both physically impossible and, under the Trading with the Enemy Act, 1939, s. 1, illegal for the plaintiff to present the cheque for payment at Amsterdam, and the defendants declined to direct their London branch to honour the cheque, which they subsequently cancelled. On February 25, 1941, the plaintiff issued the writ in the present action, claiming payment of the cheque and alleging that presentment of the cheque for payment was excused, as it was impossible and illegal to effect it owing to the German occupation of the Netherlands, of which fact the defendants had had notice.

Beyfus K.C. and *Valentine Holmes* for the plaintiff. By s. 45 of the Bills of Exchange Act, 1882, a cheque must be duly presented for payment, otherwise the drawer and indorsers are discharged, but by s. 46, sub-s. 1, delay in making presentment is excused when it is caused by circumstances beyond the control of the holder, and not imputable to his fault, misconduct, or negligence, and by sub-s. 2, presentment for payment is dispensed with where, after the exercise of reasonable diligence, presentment cannot be effected. There can be no doubt that, in spite of all reasonable diligence on the part of the plaintiff, presentment could not be effected in Holland. Therefore, if English law applies, which it does, there is an end of the defence of non-presentment. In *Francke* v. *Rasch* (1) Younger J. held that s. 46, sub-s. 2 (*a*), afforded a complete excuse to English holders of foreign bills for non-presentment. Apart from the impossibility of presenting the cheque in Holland, presentment was rendered illegal, after the Germans invaded Holland, by the Trading with the Enemy Act, 1939. The invasion and occupation of Holland are clearly not facts purely personal

(1) [1918] 1 Ch. 470, 479.

to the plaintiff, and it is submitted that the observations of Younger J. in *Francke* v. *Rasch* (1) are conclusive in the plaintiff's favour.

Gerald Gardiner for the defendants. At the moment the money in question is in Amsterdam. If the defendants could get it back they would at once pay it over to the plaintiff. The defendants have no interest in the matter and they have received no consideration. Prima facie there has been no breach of contract on their part, and there cannot be until the presentment of the cheque. The plaintiff seeks to say, not merely that he is excused from presenting the cheque and relieved of the consequences which would follow, namely, the discharge of the contract as a whole, but that he is entitled to be put into an even better position and to be treated as if he had performed an act which he has not performed.

The obligation of the defendants to the plaintiff is purely on the cheque. Outside the cheque there is no contractual relationship between the plaintiff and the defendants. The law of England, as from May 21, 1940, made it illegal for the plaintiff to present a cheque at Amsterdam and to receive payment there, and no action can be brought to enforce a contract which has become illegal. Moreover, as between the plaintiff and the defendants there was no consideration for the cheque. Sects. 45 and 46 of the Act of 1882, being exceptions to the general principle, have to be construed strictly. Sub-s. 2 (*a*) of s. 46 is not appropriate to the facts of the present case, for where the performance of a requirement has become illegal, it is not possible to say whether or not "reasonable diligence" to comply with it has been exercised. The illegality of presentment here merely holds the contract in suspense. "Duly presented" covers presented as soon as possible: per Lord Ellenborough C.J. in *Patience* v. *Townley* (2). By s. 1 of the Bills of Exchange Act, 1914, delay in the presentment for payment of a bill of exchange where the place for payment was outside the British Isles

(1) [1918] 1 Ch. 470, 479.
(2) (1805) 2 Smith, K. B. 223, 224.

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was excused if due to circumstances arising out of the war then existing, or to the impracticability, owing to similar circumstances, of transmitting the bill to the place of payment with reasonable safety. That showed that the legislature in 1914 appreciated that the provisions of the Act of 1882 as to exercising "due diligence" had no application to a state of affairs where it was illegal to exercise any diligence at all. [*Rouquette* v. *Overmann* (1) was also referred to.]

Beyfus K.C. in reply. The point raised by the defence as to the effect of presentment of the cheque being illegal is covered by the observations of Younger J. in *Francke* v. *Rasch* (2). Nothing is more calculated to render presentment impossible than making it illegal. It is wrong to treat an action on a cheque as an ordinary action on a contract.

STABLE J. [stated the facts; found that the plaintiff had exercised reasonable diligence regarding the presentment of the cheque, but that as from the time when the cheque came into his possession, it had been impossible for him to present it in Amsterdam for payment, and that, from and after May 21, it also became illegal for him to do so, and continued:] In my view, if English law applies, presentment of this cheque for payment, as a condition precedent to the liability of the defendants, was dispensed with under s. 46, sub-s. 2, of the Act of 1882. If it were necessary for me to decide whether the law of England or the law of Holland prevailed, I should hold that it was the law of England. The point is, however, purely academic, because I am quite satisfied by the evidence that there is no substantial distinction, so far as anything material to this case is concerned, between the law of the Netherlands and the law of England. Each says, in effect, that, when presentment is impossible, the necessity for that formality is excused.

Mr. Gardiner raised other points. He urged that there was no consideration for this cheque. I entirely failed to understand that part of his argument. There was ample consideration. The plaintiff received the cheque on the terms of the letter with which it was sent as payment—whether conditional or absolute payment I do not know, and it does not matter—for goods which he was shipping to the continent.

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(1) [1875] L. R. 10 Q. B. 525, 537. (2) [1918] 1 Ch. 470, 479.

Mr. Gardiner, however, took one point which I am bound to say has caused me a considerable amount of doubt. He says, rightly: "The obligation of the defendants to the "plaintiff is on the cheque. Outside the cheque there is no "contractual relationship between the parties. There is no "alternative claim for the price of goods sold and delivered, "or anything of that kind." That is correct. Mr. Gardiner, accordingly, argues that since from May 21, 1940, the law of England made it illegal, in addition to its being impossible, for the plaintiff to present the cheque at Amsterdam, and to receive payment there, that illegality precludes a successful action being brought on the cheque. Although, he contends, in certain circumstances, s. 46, sub-s. 2, of the Act of 1882 dispenses with the necessity of presentment, that cannot impose on the defendants an obligation to pay an amount arising out of a contract the performance of which has been rendered illegal.

I confess that that is an attractive argument. Mr. Beyfus maintains that the point is concluded in his favour by authority.

The only authority which, it is suggested, throws any light on this point is *Francke* v. *Rasch* (1), but in truth the point in question here was never taken in that case. The negotiable instruments which were the subject-matter of the claim were bills of exchange which had been accepted by various customers on the continent and had been discounted by the drawers with their bankers in London. The drawers, an enemy firm, in circumstances which arose out of the last war, were being wound up under the provisions of the Trading with the Enemy (Amendment) Act, 1916, and the bank sought to prove in the winding-up for the face values of the bills. The decision was that, the bills being payable at places in enemy territory, the obligation of the acceptors being only to pay at the times and spaces specified, and the German and Austrian governments having extended the maturity dates of the bills, there was no immediate liability on the drawers because their obligation was only a secondary obligation to pay if and when the acceptors failed to do so. On those grounds the claim in the winding-up was rejected. The point that it had become illegal for the acceptors to pay was never taken, perhaps because, if it had been established, the obligation to pay would have been thrown on the drawers. But whatever the reason the point was not taken, with the result that I can find nothing in the decision of that case which concludes or illuminates the question which I have to decide.

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(1) [1918] 1 Ch. 470.

I have, therefore, to decide the point unaided by authority. It is important to remember that there is nothing which makes it illegal for the plaintiff to receive the sum of money which he claims from the defendants, and nothing which makes it illegal for the defendants to pay that sum of money to the plaintiff. The only illegality—that which supervened as from May 21, 1940—was in relation to the machinery by which that payment could be effected. In my view, when s. 46, sub-s. 2 (*a*), of the Act of 1882 provides that in certain circumstances presentment for payment shall be dispensed with, that involves that all the machinery and formality which presentment involves is expunged and the holder of the bill is at liberty to call upon the drawer to pay. Where the only thing which is illegal is the presentment of the bill at the place indicated therein, it would defeat the whole object of the statute to hold that the holder of the bill, who ex hypothesi has not presented it, is precluded from suing on it. One might conceive a case in which a cheque was drawn on a branch of a bank in a certain street of an English town, and, owing to the exigencies of the war, that street might become a special area, the public, by Act of Parliament or regulation, being precluded from going or transacting business there. If the result was that everybody who held a cheque payable at that branch of the bank was to be deprived of his right to

(1) [1918] 1 Ch. 470, 479.

sue on the cheque, the whole object of s. 46, sub-s. 2 (*a*), would be rendered nugatory.

The plaintiff, therefore, succeeds and is entitled to judgment for 411*l*. 13*s*., the sterling equivalent of 2989.30 guilders, with the appropriate interest.

Judgment for plaintiff.

Solicitors for the plaintiff: *Godfrey Warr & Co.*
Solicitors for the defendants: *Bischoff & Co.*

A. W. G.

YORKSHIRE DALE STEAMSHIP COMPANY *v.* MINISTER OF WAR TRANSPORT.

C. A.
1941
July 28, 29;
Aug. 5.

Insurance (marine)—War risk—Warlike operation—Stranding—No other intervening cause.

The C., sailing in convoy and admittedly engaged in a warlike operation, namely, the conveyance of war stores, stranded, owing to an unexpected set of the tide. There was no improper navigation or negligence on the part of the ship.

Held, by the Court of Appeal (Scott, MacKinnon and Luxmoore L.JJ.), reversing the decision of Viscount Caldecote C.J., that the loss of the C. was by a marine risk, and the fact that she was engaged on a warlike operation was irrelevant since there was no chain of causation between that fact and the stranding.

Per Luxmoore L.J. It is not possible to spell out of the authorities the principle that where a ship is engaged in a warlike operation there is a prima facie presumption that any loss suffered during its continuance is a loss in consequence of that operation. and consequently the onus of proving the contrary is on the person seeking to escape liability. The existence of such a principle would be contrary to the ratio decidendi in *Britain Steamship Co., Ld.* v. *The King* [1921] 1 A. C. 99.

APPEAL from Viscount Caldecote C.J.

On September 7, 1939, the motor vessel *Coxwold*, which was owned by the claimant company, was requisitioned by the Ministry of Shipping, the predecessors of the defendant, on the terms of the form of charterparty known as T 99A which incorporates the conditions set out in Form T 773 relating to war risk insurance. By cl. 2 of the charterparty T 99A the owners' liabilities are defined as including the liability to provide and pay for " the insurance of the ship except as otherwise pro-"vided in cl. 23." By cl. 23 it is provided: " For provisions "relating to war risk liability or insurance see attached Form "T 773, the provisions of which are herewith incorporated." Form T 773 provides by cl. 1 that " (1.) The risks of war which "are taken by the charterers [the Minister of War Transport] "are: (*a*) those risks which would be excluded from an "ordinary English policy of marine insurance by the following, "or similar, but not more extensive clause: ' Warranted free "'of capture, seizure, arrest, restraint, or detainment and "' the consequences thereof or of any attempt thereat, also "' from the consequences of hostilities or warlike operations, "' whether there be a declaration of war or not, civil war, "' revolution, rebellion, insurrection or civil strife arising "' therefrom or piracy'; (*b*) loss of or damage to the ship "hereby chartered caused by: (i.) hostilities, warlike opera-"tions, civil war, revolution, rebellion, insurrection or civil "strife arising therefrom; (ii.) mines, torpedoes, bombs or "other engines of war." The defendant, therefore, took the war risk and the claimants the marine risk. At about 2.45 A.M. on May 7, 1940, the *Coxwold* suffered damage by stranding on the west coast of Skye when bound in convoy from Greenock to Narvik with a cargo of petrol for use by His Majesty's forces in the Norwegian campaign. The convoy contained four merchant vessels and four destroyers, and the Minister admitted that the *Coxwold* was at the material time engaged on a warlike operation. At about 1.25 on the morning in question the *Coxwold* lost contact with the convoy through bad visibility and only shaded stern lights. Apparently, she kept on the main convoy course till 2.30 A.M., when her second officer, who was in charge on the bridge, noticed a number of red and green lights, some on the port bow, some on the starboard bow, and others right ahead. Thinking they were the lights of an on-coming convoy, he switched on his own sidelights and reduced to half-speed, there being a heavy rain squall at the time. He altered course half a point to starboard, and passed through without collision, and when clear altered back to the mean convoy course. It turned out afterwards that the convoy through which he had passed was his own convoy, apparently retracing its course on some exceptional manœuvre. Almost immediately afterward, just before 2.45, he noticed a wash ahead and ran on the rocks.

A claim by the claimants against the defendant for compensation for the damage to the vessel having been referred to arbitration, the arbitrator found as a fact that there was no negligent navigation on the part of the *Coxwold* and that the course steered appeared to be a safe one and was accurately followed, but that " there was an unexpected and unexplained "tidal set which carried the *Coxwold* some miles to the east-"ward," that " this set could not be detected by those on "board the *Coxwold* " and that " from 2.30 A.M. to the stranding "there was a heavy rain squall." In his award, which he stated in the form of a special case, the arbitrator said : " If "and so far as it is a question of fact, I find that in the above "circumstances the loss in question was the direct consequence "of the warlike operation on which the *Coxwold* was engaged." He submitted for the decision of this court the question "whether, upon the true construction of the terms of the "charterparty and Form T 773 and upon the facts found by me, "the claimants are entitled to recover against the [defendant] for "the loss sustained in respect of the stranding of the *Coxwold*."

Viscount Caldecote C.J. held that the stranding was a loss by a war peril and that the set of the tide was not such an intervening cause of the stranding as to prevent the war risk from attaching.

Sir William Jowitt S.-G. and *C. T. Miller* for the defendant. The question whether a ship is on a warlike operation no doubt depends to some extent on the nature of the cargo she is carrying, but, admitting that the *Coxwold* was on a warlike operation, that fact had nothing to do with her stranding. If she had been carrying butter for the population of Iceland instead of petrol for the troops the result would have been the same. The plaintiffs can only succeed if the

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court is prepared to hold that everything which arises in the course of a warlike operation is due to the warlike operation. Sect. 55, sub-s. 1, of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), enshrines the proper principle to be applied, a principle which was laid down long before the date of that Act. By that section " the insurer is liable for any loss proximately caused "by a peril insured against, but . . . . he is not liable for any loss "which is not proximately caused" by such a peril, and it is, therefore, necessary to consider the causa causans of the loss and not the causa sine qua non: *Ionides* v. *Universal Marine Insurance Co.* (1). Here the causa causans was the set of the tide, which was a marine peril, the warlike operation being merely the causa sine qua non. In a number of cases the House of Lords have held that where a vessel proceeding on her war occasions has been in collision, although it was impossible to say that the causa causans was a warlike operation, yet the loss of the ship was due to a war risk. The principle contained in s. 55, sub-s. 1, of the Marine Insurance Act, 1906, that the proximate cause must be looked at, appears to have been disregarded in such cases as *Attorney-General* v. *Ard Coasters, Ld.* (2), and those cases can be distinguished because in them there was no intervention such as an unexpected set of the tide. Where there is no other operating cause than the passage of the ships through the water, that must be regarded as the cause of the collision. If one ship alone is to blame or has suffered accident, her passage alone need be considered. If her status is that of a war vessel in time of war the collision is in consequence of a warlike operation. In any event, the collision cases do not apply to stranding. If a vessel runs into a storm, or by force of wind and waves is driven on to a hostile shore, that is a marine peril. The fact that a ship is being convoyed does not per se constitute a warlike operation, nor does the fact that she is sailing without lights: *Britain Steamship Co., Ld.* v. *The King* (3). In *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (4) the question of causation does not appear to have

(1) (1863) 14 C. B. N. S. 259.
(2) [1921] 2 A. C. 141.
(3) [1921] 1 A. C. 99, 136.
(4) [1923] A. C. 191.

been mentioned. Their Lordships followed decisions already given in that House. See also *Attorney-General* v. *Adelaide Steamship Co., Ld.* (1); *Adelaide Steamship Co., Ld.* v. *Attorney-General* (2); *Clan Line Steamers, Ld.* v. *Board of Trade* (3); *Board of Trade* v. *Hain Steamship Co., Ld.* (4); *Trinder Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (5); *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (6); and Phillips on Insurance, 4th ed., p. 691.

A. J. Hodgson for the plaintiffs. The arbitrator has come to a finding of fact in my favour, for the question what is proximate cause is one of fact: see Halsbury's Laws of England, 2nd ed., vol. xviii., p. 305. A warlike operation being proved, prima facie every injury suffered by the impact of the vessel moving in the course of that operation is proximately caused thereby: see observations of Atkin L.J. in *Ard Coasters, Ld.* v. *The King* (7), cited with approval by Viscount Finlay in the House of Lords in the same case, sub nom. *Attorney-General* v. *Ard Coasters, Ld.* (8) and see also *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (9). Proof of the negligent performance of the warlike operation does not displace the presumption, nor does error of judgment or mere misfortune: per Lord Sumner in *The Warilda* (9); nor proof that factors admittedly not warlike may have contributed to the loss: per Lord Sumner in *Attorney-General* v. *Ard Coasters, Ld.* (10); *Reischer* v. *Borwick* (11) as explained in *Board of Trade* v. *Hain Steamship Co.* (12). When proof (the onus whereof must lie on the person seeking to displace the presumption) is given that the loss is *solely* due to another casualty or peril, the presumption is displaced, but that must be found as a fact: *Clan Line Steamers, Ld.* v. *Board of Trade* (3).

Sir William Jowitt S.-G. in reply.

Cur. adv. vult.

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(1) [1923] A. C. 292.
(2) [1926] A. C. 172.
(3) [1929] A. C. 514.
(4) [1929] A. C. 534.
(5) [1898] 2 Q. B. 114.
(6) [1918] A. C. 350.
(7) (1920) 36 Times L. R. 555, 557.
(8) [1921] 2 A. C. 141, 147.
(9) [1923] A. C. 292, 301.
(10) [1921] 2. A. C. 141, 153.
(11) [1894] 2 Q. B. 548.
(12) [1929] A. C. 534, 539.

Aug. 5. The following written judgments were issued through the Crown Office (1).

SCOTT L.J. stated the facts as set out above and continued: The issue is very nearly whether a loss *during* a warlike operation is *therefore* a loss *by* a warlike operation, that is, proximately caused by it. There is no doubt that the words "consequences "of a warlike operation" are a description of the peril constituting the cause of the loss, and that that cause must be the proximate cause within s. 55, sub-s. 1, of the Marine Insurance Act, 1906. That was decided in the clearest terms in *Ionides* v. *Universal Marine Insurance Co.* (2), and the section did not alter the law. Consequently, cl. 1 (1.) (*b*) (i.) of Form T 773 adds nothing to sub-cl. (1.) (*a*). In my opinion, the stranding in the circumstances I have described was not only prima facie a loss by perils of the sea, as many war losses may also be, but was, on all the facts found, really and exclusively such a loss, and in no sense a loss by "warlike "operations."

In view of the decision of the House of Lords in *Britain Steamship Co., Ld.* v. *The King* (3) (usually spoken of as the cases of *The Petersham* and *The Matiana*) that sailing without lights even during war is not per se a warlike operation, the reliance placed by the Court of Appeal in *British and Foreign Steamship Co.* v. *The King* (4), on that fact as evidencing a warlike operation must be treated as mistaken. Sailing without lights is not the proximate or direct cause of a stranding (*The Matiana* case), nor of a collision with another merchantman (*The Petersham* case), nor is either loss the proximate or direct result of the warlike operation of sailing under convoy orders such as zig-zagging: see, especially, Lord Atkinson's approval of the views of Warrington and Atkin L.JJ. (1). On the other hand, where a collision takes place through vessel A, engaged on a warlike operation, running into vessel B, whether B is or is not also engaged on a warlike operation, A suffers a loss by a war peril: see *Attorney-General* v. *Ard Coasters, Ld.* (2) (particularly the first paragraph of Lord Dunedin's opinion); *Commonwealth Shipping Representative* v. *P. and O. Branch Service* (3), and *Attorney-General* v. *Adelaide Steamship Co., Ld.* (4), where Lord Sumner said: "By admission the *Warilda's* "operation was a warlike operation throughout, and as was "the whole so were the parts. Steaming into the *Petingaudet* "was one of those parts, and none the less so, whether it was "due to mere misfortune, to error of judgment, or to negligent "navigation. Had it been done wilfully the case might be "different. There might, for example, have been an abandon-"ment of the ship's warlike operation altogether, but it is "unnecessary to do more than save such a case." On the other hand, if the commercial ship is, so to speak, the actor in the collision, the loss of the other ship may not be a war risk loss.

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(1) The hearing ended on July 29, two days before the end of the sittings. Both parties agreed that the case would be taken to the House of Lords in any event, and that it was urgently desirable to apply for directions at the last sitting before the vacation of the Appeal Committee of the House on August 7. As one member of the court was engaged on other duties which rendered it impossible to deliver the reserved judgment before the vacation, the court, with the consent of the parties, handed the written judgments in vacation to the Master of the Crown Office, by whom they were made available to the parties and other persons interested.

(2) (1863) 14 C. B. N. S. 259.

(3) [1921] 1 A. C. 99.

(4) [1918] 2 K. B. 879.

The above decisions on one side or the other of the line indicate that the conclusion in the present appeal should be that the *Coxwold* was not lost *by* a war peril, but the decision of the House of Lords in *Clan Line Steamers, Ld.* v. *Board of Trade* (5), I think, clears the position a little more. There the *Clan Matheson* and the *Western Front*, two ships in a convoy, collided, without any negligence in either. The *Western Front* was, but the *Clan Matheson* was not, engaged in a warlike operation. The steering gear of the *Clan Matheson* suddenly broke down, and she came off seven points into the *Western Front*. It was held that the loss was not a consequence of a warlike operation inasmuch as the sole proximate cause was the breakdown of the *Clan Matheson's* steering gear. In

(1) [1921] 1 A. C. 119–122.
(2) [1921] 2 A. C. 141, 152.
(3) [1923] A. C. 191.
(4) [1923] A. C. 292, 301.
(5) [1929] A. C. 514.

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Board of Trade v. *Hain Steamship Co., Ld.* (1) both vessels were to blame for a collision. One, the *Roanoke*, was engaged in a warlike operation, the other, the *Trevanion*, was not. Held, that the *Trevanion's* loss was by a war peril.

What really happened in the present case was that, although the *Coxwold* was, no doubt, engaged in a warlike operation, because she was carrying a war cargo for war purposes, yet the contents of her cargo had nothing to do with the unknown and unexpected set of the tide which drove her on to the rocks. As MacKinnon L.J. said during the argument, if a sudden and great wave had fallen on her and carried away her bridge, the sea peril would have been the sole cause of her particular average loss. How does the strange tidal current differ ?

Mr. Hodgson argued the case both clearly and forcibly and in justice to him I will state his arguments. The first was that in a warlike operation a loss prima facie suffered by the impact of the vessel moving in the course of that operation is a loss by war risk, and he relied on *Attorney-General* v. *Ard Coasters, Ld.* (2), especially a passage of Viscount Finlay's opinion (3), and on *Attorney-General* v. *Adelaide Steamship Co.*, per Lord Sumner (4). The second was that negligence does not displace that presumption. The third was that error of judgment, or mere misfortune, does not, unless the *sole* cause be proved to have been inevitable accident. The fourth was that causes not warlike may have contributed and yet the loss remained a war loss. In substance he contended that the warlike operation must be regarded as continuing to have effect down to the moment of the accident. I think the fallacy of his seemingly logical argument is that in the present case the war character of the vessel's adventure was nothing more than an irrelevant circumstance, and that there was no chain—much less a direct link—of causation between that character and the stranding. She might have been painted as a hospital ship, but neither that character nor that appearance as such would have caused her to run on to the rocks. The reductio ad absurdum of that

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(1) [1929] A. C. 534.
(2) [1921] 2 A. C. 141.
(3) [1921] 2 A. C. 147–8.
(4) [1923] A. C. 292, 301.

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argument seems to be that, if it were well-founded, a King's ship navigating during war could never be lost by a marine peril. Mr. Hodgson also argued that there was a finding of fact that the loss was by a war peril, and that we could not go behind that finding, but the question of causa proxima, when all the facts are stated, as here, is a pure question of law.

The appeal must be allowed with costs here and below and the answer to the special case must be that the claimants are not entitled to recover anything, but have to pay the costs of the award and of the Minister. Leave to appeal to the House of Lords.

MacKinnon L.J. Once again this case raises the problem of the proper construction and effect of ten infamously obscure words—"Warranted free . . . . from the consequences of "hostilities or warlike operations." It is to me, personally, a melancholy reflection that during my last ten years at the Bar I was compelled, as advocate or arbitrator, to spend more time on the consideration of the effect of these ten words than on any other problem. They come back now to me as crambe repetita, and the cabbage is of the stalest.

A marine insurance policy in ordinary form covers risks of four different kinds : (1.) perils of the seas, (2.) fire, (3.) robbery, (4.) capture or other war perils. The earlier part of the f. c. and s. clause is comparatively lucid. "Free of capture, "seizure, arrest, restraint or detainment" cuts out of the policy the expressed risks, "surprisals, takings at sea," and so forth. But the final words "free from the consequences of "hostilities or warlike operations" are fatally obscure. They do not only cancel such insured perils as "enemies." They are a limitation of liability in respect of loss caused by all the insured perils. No one can define with accuracy their exact result, even with the guidance of the innumerable cases in the books. This is not the fault of the law or of the judges. It is the fault of those who chose very many years ago to frame a vital clause in their contracts in language of such obscurity, and those who, despite the recurring proof of that obscurity, have insisted on continuing their use and abstained from any attempt to draft their contract in more intelligible terms.

There are now an immense number of cases about the effect of these ten words as applied to a great variety of facts. Many of them were cited to us. It is perhaps a truism to say that reported cases are only of value towards the decision of later cases in so far as they lay down principles of law or of construction. I confess that very few of the cases cited to us seem to me to lay down any principle or principles of value in construing these ten words. Moreover, as many of them were decisions of the House of Lords, and, therefore, binding on us, it is possible to find in them isolated sentences by various noble Lords with regard to the effect of these words on the facts of the particular case under appeal. But, unless those sentences enunciate some principle of construction, I do not think it is profitable, or legitimate, to say: " The facts "of the case in which this or that sentence was used are rather "like the facts in this case, and, therefore, this case should be "decided in the same way." One of the few cases which does undoubtedly lay down a principle of construction of the words of an f. c. and s. clause is one of the earliest of all, *Ionides* v. *Universal Marine Insurance Co.* (1), for that case decided that, in construing the word " consequences," the primary rule as to causation in marine insurance must be used. A " consequence," to be within the words, must be a loss proximately caused by the specified " hostilities " or "warlike operations."

The vessel in the present case sustained loss or damage by going aground on a reef or rocks. Prima facie there can be no doubt that such a loss or damage is proximately caused by perils of the seas. The question is whether an underwriter sued for such a loss as a loss by perils of the seas could, on the further facts found as to the cargo of the vessel and the nature of her voyage, successfully defend the claim by a plea that the loss was proximately caused by hostilities or warlike operations. Those further facts are that the vessel, while under requisition by the government, was sailing in convoy

(1) 14 C. B. N. S. 259.

with a cargo of petrol for use by the Army in the campaign in Norway to be delivered at Narvik. The convoy was in charge of a naval officer and guarded by destroyers, and no navigating lights were exhibited. It was admitted by the Minister that the *Coxwold*, while carrying this cargo on this voyage, was engaged on a warlike operation. If the contract provided that no loss or damage should be recoverable under the policy at a time when the insured vessel was engaged in a warlike operation, the answer to a claim against the underwriter would be clear and easy, but Mr. Hodgson did not suggest that this was the effect of the f. c. and s. clause. He admitted that while the *Coxwold* was on this voyage, and was, therefore, herself engaged on a warlike operation, she might sustain damage which would be recoverable under a policy containing this clause. That admission was in answer to my suggestion: "Suppose on this voyage she met very bad "weather, and the violence of the waves carried away her "bridge, would that not be a loss by perils of the seas, and "could you contend that it was a consequence of warlike "operations ?" He replied that it would be such a loss, and that he could not say it was within the exception. But, as I gathered, that was because of the catastrophic nature of the casualty I had suggested.

To establish a loss by perils of the seas it is not necessary to prove any catastrophic disaster. The definition in r. 7 of the Rules for Construction of Policy in Sch. I. to the Marine Insurance Act, 1906, is as follows: "The term 'perils of the "'seas' refers only to fortuitous accidents or casualties of "the seas. It does not include the ordinary action of the "winds and waves." But there may be a fortuitous accident or casualty without any catastrophe or violence. If a vessel dragged her anchor from its being insecure and drifted ashore, any resulting damage would be a loss by perils of the seas. In this case the *Coxwold* was carried off her course "by an "unexpected and unexplained tidal set which carried her some "miles to the eastward . . . . and this set could not be "detected by those on board the *Coxwold*"—I quote the special case. Being so taken off her proper course, she struck the rocks and sustained damage. With an ordinary marine policy there cannot be the slightest doubt that this damage could be claimed as a loss by perils of the seas.

How then, if the policy contained the f. c. and s. clause, could the underwriter successfully plead that this loss, so obviously caused by perils of the seas, was not recoverable, on the ground that it was proximately caused by a warlike operation ? The only facts to be relied on for that suggestion would be (*a*) the nature of her cargo, and (*b*) the fact that she was proceeding with that cargo from Greenock to Narvik. In other words, that while on that voyage with that cargo the vessel was herself engaged on a warlike operation. But the clause does *not* say : " No loss shall be recoverable while "the vessel is engaged on a warlike operation." And for my part, when damage manifestly caused by perils of the seas has been sustained, I can see no logic in the contention that, because the vessel was on a voyage which was itself a warlike operation, this damage by sea perils must be deemed to be a consequence of a warlike operation.

From one or other of the isolated sentences in the cited cases, Mr. Hodgson relied on the proposition that if a destroyer, or other warship, was steaming across the seas and collided with a merchant ship, the damage sustained by that merchant ship would be a consequence of a warlike operation. That may be so. But I cannot think it a proper corollary from that to infer that when a vessel, by reason of her cargo and her voyage, is engaged on a warlike operation, any damage she sustains by impact with any hard object is a consequence of warlike operations. Nor can I see any logic in the distinction between damage to the vessel, while on such a voyage, by her bridge being washed away in a storm, and damage to her bottom by stranding on an unexpected rock.

In the result, this seems to me clearly to have been damage to this ship proximately caused by perils of the seas, and I do not think that the marine risk underwriters could resist a claim for that loss by contending that, by reason of the nature of her cargo and her port of destination, the loss came within the f. c. and s. clause as a consequence of warlike operations.

I, therefore, think this appeal should be allowed, with costs here and below.

LUXMOORE L.J. The short question to be determined in this appeal is in substance : Was the damage suffered by the motor vessel *Coxwold* belonging to the plaintiffs (to whom I will refer as " the owners ") the direct consequence of warlike operations or of a marine peril? The Lord Chief Justice held that it was the direct consequence of warlike operations, and in so doing he upheld the award of Sir Robert Aske K.C., to whom the parties had in the first instance submitted the question. The arbitrator at the request of the parties stated his award in the form of a special case. After stating the material facts with sufficient clarity to avoid any question or doubt with regard thereto, he stated that : " If and so far as "it is a question of fact, I find that in the above circumstances "the loss in question was the direct consequence of the warlike "operations on which the *Coxwold* was engaged." It was argued on behalf of the owners both before the Lord Chief Justice and this court that this was a finding of fact which could not be challenged because there was some evidence on which it could be based. The Lord Chief Justice rejected this argument, and it seems to me that he was plainly right in so doing from a consideration of the numerous reported decisions to which our attention was called. Those decisions have invariably treated the ultimate question, namely, what was the proximate cause of the loss under consideration, as one to be determined by the court. Indeed, the arbitrator so treated it in the case where he states the question for the decision of the court in these words : " Whether upon the true "construction of the terms of the charterparty T 99A and "Form T 773 and upon the facts found by me, the claimants " (that is, the owners) " are entitled to recover against the "respondent " (that is, the Minister of War Transport) " for "the loss sustained in respect of the stranding of the *Coxwold*." It was recognized by counsel for each of the parties at all stages of the litigation that the effect of the provisions of charterparty T 99A and form T 773 is to place on the Minister of War Transport the liability for loss arising from risks of war, including risks arising in consequence of warlike operations, while the liability for loss arising from marine perils remained with the owners.

[His Lordship stated the facts.] It seems to me plain that the arbitrator has found that the proximate cause of the stranding of the *Coxwold* was what he described as the unexpected and unexplained tidal set. Further, it seems to me equally plain that, but for the existence of a warlike operation, this could only be described as a marine peril. It was admitted, however, on behalf of the Minister of War Transport that the *Coxwold* was, on May 6 and 7, including the time of the stranding, engaged in a warlike operation in that she was carrying from one war base to another a cargo of petrol for the use of the British military forces in the field in Norway.

It was frankly admitted by Mr. Hodgson on behalf of the owners, although the contrary was argued before the arbitrator and the Lord Chief Justice, that the fact that a loss occurred during the course of a warlike operation cannot necessarily afford the answer to the question whether it occurred in consequence of it, but he argued that in the present case it was sufficiently established that the loss occurred in consequence of the warlike operation admitted. A large number of cases in which the question whether loss has arisen in consequence of warlike operations has been debated are to be found in the books, many of them being decisions of the highest tribunal. It is not surprising that passages can be found in the speeches of one or other of the noble Lords who were parties to the several decisions to support the arguments of counsel for both parties in the present case, and I confess it is not an easy task to reconcile the various obiter dicta relied on, but, after all, the question can only be dealt with in each case on the particular facts peculiar to it, and similarity of fact as distinguished from identity is not always a safe or trustworthy guide.

The main principle to be borne in mind in cases like the present is that laid down in s. 55, sub-s. 1, of the Marine Insurance Act, 1906, which is as follows: "Subject to the "provisions of this Act, and unless the policy otherwise "provides, the insurer is liable for any loss proximately caused "by a peril insured against, but, subject as aforesaid, he is not "liable for any loss which is not proximately caused by a "peril insured against." This section did not make new law, it simply recognized and stated the principles laid down in the decision of the Court of Common Pleas in *Ionides* v. *Universal Marine Insurance Co.* (1). The policy of insurance in that case contained an exception which included "consequences of hostilities." The subject-matter of the insurance was a cargo of coffee on board the ship *Linwood*, which was wrecked. The insurers sought to escape liability because, owing to the existence of the war between the Northern and Southern States of America, officers appointed by the latter had extinguished the light which before that war had been kept burning at Cape Hatteras. Erle C.J. said (2) that: "the extinguishment of the light was undoubtedly an act of "hostility on the part of the confederates towards the federals," and he asked the question: "But was the loss the consequence "of hostilities?" He continued: "I agree .... that the question "is entirely one of construction, and that the intention of the "parties is to be gathered from the contract itself, taking it "with the surrounding circumstances .... I agree .... that the "words of the exception in this policy are to be construed as "they would be if the assured had re-assured his cargo against "the perils which are excepted by the warranty now in "question; so that, to make the policy attach, the court "must in that case have held that the consequence of hostilities "was so connected with the loss of the ship as to make the "underwriters liable. The maxim causa proxima non remota "spectatur is peculiarly applicable to insurance law. The loss "must be immediately connected with the supposed cause "of it .... Was the putting out the light at Cape Hatteras so "immediately connected with the loss of this ship as to make "the one the consequence of the other? Can it be said that "the absence of the light would have been followed by the "loss of the ship, if the captain had not been out of his "reckoning? It seems to me that these two events are too

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(1) 14 C. B. N. S. 259.
(2) Ibid. 284.

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"distantly connected with each other to stand in the relation "of cause and effect." The Chief Justice then put a number of hypothetical cases to illustrate the proposition that, although the existence of the hostilities may be the cause without which the loss would not have happened, yet the proximate cause of loss may be by peril of the sea and not in consequence of hostilities. It is sufficient to refer to the last hypothetical case put by the Chief Justice. He says (1): "Take another "instance. The warranty extends to loss from all the conse-"quences of hostilities. Assume that the vessel is about to "enter a port having two channels, in one of which torpedoes "are sunk in order to protect the port from hostile aggression, "and the master of the vessel in ignorance of the fact enters "this channel and his ship is blown up: in that case the "proximate cause of the loss would clearly be the consequences "of hostilities, and so within the exception. But suppose "the master, being aware of the danger presented in the one "channel, and in order to avoid it, attempts to make the "port by the other, and by unskilful navigation runs aground "and is lost, in my opinion that would not be a loss within the "exception, not being a loss proximately connected with the "consequences of hostilities but a loss by a peril of the sea and "covered by the policy." The Chief Justice applied the principles he had stated to the facts relating to the wreck of the *Linwood* and held that the absence of the light was not the proximate cause of the loss and that that loss had occurred by reason of a marine peril.

The principles there laid down have repeatedly been referred to and have always been accepted without question. They appear to me to cover the present case, for there is, so far as the application of the principles is concerned, no substantial difference between the phrase "in consequence of hostilities" and the phrase "in consequence of warlike operations." The *Coxwold* was sailing without lights in convoy carrying a cargo of petrol for the use of the British military forces in Norway, her destination being the port of Narvik. The sailing without lights is not in itself a warlike operation: see *The Petersham*

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(1) 14 C. B. N. S. 259, 286.

(*Britain Steamship Co., Ld.* v. *The King* (1)), nor is the sailing in convoy: see *The Matiana* (2). The only warlike operation on the part of the *Coxwold* was the carrying of material (i.e. petrol) for war purposes to a destination in the seat of war, but neither the fact that the material was required for war purposes nor the fact that its destination was a war base can have had any effect on the influence of the unexpected and unexplained set of the tide on the *Coxwold*. The tidal set would have carried the *Coxwold* on to the Damsel Rocks whatever her cargo and wherever her destination, and it is for this reason I think that the stranding of the *Coxwold* was the direct consequence of a marine peril, for the warlike operation had no greater part in causing it than it would have had if the stranding had been caused by a storm of sufficient force to drive the *Coxwold* on to the rocks.

Mr. Hodgson, on behalf of the owners, argued that there was a principle to be deduced from the decided cases that where a ship is engaged in a warlike operation there is a prima facie presumption that any loss suffered during its continuance is a loss in consequence of that operation, and, consequently, that the onus of proving the contrary is on the person seeking to escape liability. I am unable to spell out any such principle from the cases referred to. Indeed, the existence of such a principle would be contrary to the ratio decidendi of *The Petersham* case (*Britain Steamship Co., Ld.* v. *The King* (1)), in which Lord Atkinson said (3): "Collision at sea is prima "facie a sea risk. The burden of rebutting that presumption "rests in this case upon the suppliants" (who were asserting that the collision was the consequence of warlike operations). "Whatever be the true meaning of the words 'hostilities' and "'warlike operations' as used in . . . . the charterparty . . . . the "suppliants can, on the facts proved, only recover the damages "sued for by establishing affirmatively that this collision was "not a sea peril, but was the direct and proximate consequence "of an act of 'hostility' or of a 'warlike operation'." It would be wholly illogical to shift the onus by reason of the

(1) [1921] 1 A. C. 99.
(2) Ibid. 104.
(3) Ibid. 113.

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Yorkshire Dale S.S. Co. v. Minister of War Transport.

Luxmoore L.J.

existence of a warlike operation which cannot by any possibility affect in any manner the operation of the sea peril suffered. It is to be observed that Mr. Hodgson admitted that, if it was established that the sole cause of the loss was a peril of the sea or some other non-warlike operation, the onus of displacing what he stated was the prima facie presumption, was discharged. He further argued that an express finding that the peril of the sea or the non-warlike operation was the sole cause of the loss was essential. As I have already stated, I think the finding of the arbitrator was plainly to the effect that the tidal set was the sole cause of the damage, for, although he did not state it in so many words, he negatived the existence of any negligence or other contributory cause.

I have not referred in detail to the cases to which our attention was called, because they are dealt with in the judgment of Scott L.J., which I have had the privilege of considering and with which I find myself in complete agreement. I have also had the same privilege with regard to the judgment of MacKinnon L.J., with which I also agree.

In my judgment, for the reasons given by my brethren, and for those I have endeavoured to express, the appeal should be allowed, and the order of the Lord Chief Justice should be discharged. I also agree that the costs of the Minister of War Transport in the court below and in this court should be paid by the owners, and that leave should be given to them to appeal to the House of Lords.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor, Ministry of War Transport Branch.*

Solicitors for respondents: *Holman, Fenwick & Willan.*

J. W. H.

Applied. THUROGOOD v. VAN DEN BERGHS & JURGENS LD. [1951] 2 K. B. 537

LONDON CO-OPERATIVE SOCIETY, LIMITED *v.* SOUTHERN ESSEX ASSESSMENT COMMITTEE.

1941
July 21.

Rates — De-rating — Industrial hereditament — Laundry — Canteen — Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 4— *Rating and Valuation* (*Apportionment*) *Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1.

A laundry conducted by a co-operative society included a canteen which was used solely for supplying refreshments to the workers in the laundry which was admittedly an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. All the food supplied in the canteen had to be purchased, and all purchases ranked for the usual dividends paid in respect of purchases made at the co-operative society's retail shops :—

Held, that the canteen was not a place which was " solely used " for some purpose other than the manufacturing process or " handicraft, carried on in " the laundry within s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, and, therefore, that it was entitled to be derated as being part of the industrial hereditament.

Per Tucker J. The decisive element is that the canteen was essential for the welfare and efficiency of the workers engaged in the admittedly industrial part of the undertaking.

Principles laid down by Avory J. and Talbot J. in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* [1931] 1 K. B. 47, at pp. 68, 76, 78, applied.

CASE stated by Essex Quarter Sessions.

On March 20, 1939, the rating authority for the borough of Romford made a proposal to amend the valuation list by entering therein in the sum of 1300*l.* rateable value a hereditament consisting of a laundry, situate in Eastern Avenue, Romford, and occupied by the appellants, the London Co-operative Society, Ld. The appellants objected to the proposal and claimed that the hereditament was an industrial hereditament for the purposes of the Rating and Valuation (Apportionment) Act, 1928 (1), and the Local Government Act, 1929.

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(1) By s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 : " In this Act " the expression ' industrial here- " ' ditament ' means a heredita- " ment . . . . occupied and used " . . . . as a factory or work- " shop : Provided that the ex- " pression industrial hereditament " does not include a hereditament " occupied and used as a factory " or workshop if it is primarily

The respondent assessment committee heard and determined the proposal and objection on July 17, 1939, when they entered the hereditament as an industrial hereditament at the following values: Net Annual Value, 1300*l*; Industrial Purposes, 1158*l*.; Other Purposes, 142*l*.; Total Rateable Value, 431*l*. The appellants gave notice of appeal to quarter sessions against this determination on the ground that the apportionment of the net annual value as determined by the assessment committee was incorrect in that the value of a canteen in the hereditament had been attributed to non-industrial purposes instead of, as the appellants contended it should have been, to industrial purposes, and that the value ought, therefore, to be apportioned as to 1220*l*. to industrial purposes and as to 80*l*. for other purposes and the total rateable value should be 385*l*.

On the hearing of the appeal on January 26, 1940, it was admitted or proved that the hereditament was erected in 1938 and was occupied and used by the appellants as a laundry. It was about 1400 yards from the centre of the town of

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"occupied and used for . . . . "(*b*) the purposes of a retail "shop . . . ."

By sub-s. 2: ". . . . the "expressions 'factory' and "'workshop' have respectively "the same meanings as in the "Factory and Workshop Acts, "1901 to 1920."

By s. 4, sub-s. 2: "For the "purpose of determining in what "proportions an industrial hereditament is occupied and used "for industrial purposes and for "other purposes respectively, the "following provisions shall have "effect: (*a*) The hereditament "shall be deemed to be occupied "and used for industrial purposes "except in so far as any part "thereof is, under this Act or "under the enactments relating "to the regulation of . . . . factories and workshops, to be "deemed neither to be, nor to "form part of, a . . . . factory, "or workshop."

By the Factory and Workshop Act, 1901, s. 149, sub-s. 4: "Where a place situate within the "close, curtilage, or precincts "forming a factory or workshop "is solely used for some purpose "other than the manufacturing "process or handicraft carried on "in the factory or workshop, "that place shall not be deemed "to form part of the factory or "workshop for the purposes of "this Act . . . ."

By the Factory and Workshop Act, 1907, s. 1: "laundries "carried on by way of trade" were added to the list of non-textile factories and workshops in Part II. of Sch. VI. to the Factory and Workshop Act, 1901.

Romford, to and from which there were frequent omnibus services. Within a few minutes' walk of the hereditament was a public-house which had no restaurant but supplied bread and cheese and other "snacks." Apart from this there were no restaurant or eating-house facilities short of Romford. The appellants included a canteen in the hereditament because it was considered that the site was in a comparatively isolated spot where there were no suitable or convenient premises at which the staff could obtain food, particularly lunches; that this was especially important in view of the fact that the great majority of the laundry "hands" would be females; that the journey to and from Romford for lunch would be expensive, tiring, and irksome to the workers, while the time spent in getting there and back would take up an appreciable amount of the hour allowed for lunch which would be better spent in a leisurely manner; and that in inclement weather the waiting for omnibuses would be unpleasant as well as tiring. The appellants, therefore, considered that a canteen was necessary for the welfare of the workers and for the efficiency of the laundry. The canteen consisted of two rooms separated by a kitchen with double service and food display counters. These rooms were used respectively as men's and women's canteens. They were furnished with tables and chairs. The canteen was used solely to supply hot meals, light refreshments, and hot and cold drinks to workpeople employed at the laundry. In an agreed statement of facts submitted to the rating appeal committee of quarter sessions it was stated: "The canteen "is essentially a 'canteen' and not a 'messroom' in that all "the food supplied thereat must be bought and all purchases "rank for the usual dividends paid in respect of purchases "made at the appellants' shops." By the appellants' rules (r. 29) the profits of all business carried on by or on account of the society shall be applied as follows: "(7.) By payment "of a dividend to members in proportion to the amount of "their purchases at such rate as the committee of management "recommend and the members in general meeting approve." The appellants did not conduct the canteen with a view to making a profit. In fact, a loss was made. Hot meals comprising a meat dish, vegetables and a sweet were provided for the female laundry hands at a fixed price of *7d.* and for the male laundry hands of *9d.* If the canteen was occupied and used for industrial purposes within the meaning of s. 4 of the Rating and Valuation (Apportionment) Act, 1928, the net annual value of the hereditament should be apportioned as to 1220*l.* for industrial purposes and as to 80*l.* for other purposes and its total rateable value should be 385*l.* If the canteen was occupied and used for purposes other than industrial purposes the assessment appealed against was correct.

The rating appeal committee of quarter sessions dismissed the appeal, holding that the canteen was occupied and used, not for industrial purposes, but as a retail shop. At the request of the appellants quarter sessions stated this case for the opinion of the court whether, on the facts stated, the decision of quarter sessions was correct in point of law.

H. B. Williams for appellants. Quarter sessions based their decision on s. 3, sub-s. 1, of the Act of 1928, but the exceptions contained in that sub-section of hereditaments which are not included in the expression "industrial hereditament," while material in deciding whether premises come within the expression "industrial hereditaments," are not material when the question is how an industrial hereditament must be apportioned. Lord Dunedin in *Moon* v. *London County Council* said (1): "Now I go to the proviso [to s. 3, "sub-s. 1], but before doing so I remark that if once the "hereditament is qualified as a factory or workshop by direct "description that part of the inquiry is ended and a discussion ". . . . whether the factory is carried on for gain or not . . . . "[is] quite beside the mark and irrelevant." In every factory certain things must by law be provided for the comfort of the workers, such as rest rooms, or lavatories, but it has never been suggested that they are not part of the industrial hereditament. In *George Outram & Co.* v. *Inland Revenue* (2) the question was whether the whole of the premises where

(1) [1931] A. C. 151, 166.

(2) 1930 S. C. 351.

a newspaper was produced and published was used as an industrial hereditament, and it was held that part of the premises which was devoted to the accommodation of the managerial, editorial and clerical staffs was not used for industrial purposes, and, therefore, could not be derated. A clear distinction was drawn between the manufacturing processes in producing the newspaper and other processes. In the present case conducting a canteen is not carrying on a process other than that carried on in the laundry. In *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (1), also a case of the apportionment of premises used for the publication of a newspaper, a question arose of a messroom and cookhouse, and Talbot J. said (2) that whether or not they came out of the industrial part of the building "must "depend upon the persons for whose accommodation they are "provided and used: according to whether they relate to "the industrial part, the factory proper, if I may use the "term, or to the clerical and editorial part of the hereditament." In other reports than the Law Reports the word used by Talbot J. was "may" and not "must." Here the canteen is supplied for the use of the workers in the laundry and it is, therefore, just as much used for industrial purposes as the rest of the industrial hereditament.

A. H. Forbes for the respondents. The case of *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (1) decided no more than that the question whether a messroom and a cookhouse were industrial hereditaments depended on the persons for whose use they were provided. It did not extend to a canteen. The distinction between a messroom and a canteen is pointed out in the special case, where it is stated that this canteen was used for purposes other than industrial purposes, namely, as a retail shop, and that is a finding of fact which the court cannot disturb. Lord Sands pointed out in *George Outram & Co.* v. *Inland Revenue* (3) that s. 149, sub-s. 4, of the Factory Act, 1901, provided that, where a part of the factory premises is used solely for some purpose other than the manufacturing process or handicraft carried on in the factory, it is not to be deemed to form part of the factory, and he went on to say: "Now it appears to me that what is "done in the editorial part of these premises exactly answers "that description. It is something other than a manufacturing "process or handicraft." One would never have a newspaper but for the editorial department, but nevertheless it was held that the editorial department was not part of the industrial hereditament. The same reasoning applies to this canteen. Quarter sessions did not find that the canteen was necessary to carry on the laundry as an industrial hereditament. They rightly applied the law as laid down in s. 149 of the Factory Act, 1901. The canteen is part of the appellants' business and the laundry workers who use it receive a dividend on their purchases as do customers at the appellants' retail shops.

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(1) [1931] 1 K. B. 47.
(2) Ibid. 78.
(3) 1930 S. C. 354.

H. B. Williams in reply. This is a question of law and not of fact. There is no distinction for this purpose between a messroom and a canteen. This canteen bears no analogy to a retail shop.

Viscount Caldecote C.J. This is one of the cases which illustrate some of the minor difficulties of the legislation which dealt with the derating of industrial premises, and, to arrive at a decision, it is necessary to look a little carefully at that legislation.

The Rating and Valuation (Apportionment) Act, 1928, by s. 3, sub-s. 1, to use Lord Dunedin's expression in *Moon* v. *London County Council* (1), contained provisions applying to hereditaments "qualifying" for inclusion in the category of industrial hereditaments. By the proviso to that sub-section it was enacted that "the expression industrial hereditament does not "include a hereditament occupied and used as a factory "or workshop if it is primarily occupied and used" for a number of purposes which are set out, one of which is "the "purposes of a retail shop." In *Moon* v. *London County Council* (1) Lord Dunedin clearly stated, and it must be treated as implicit in the decision in that case, that, if a hereditament

(1) [1931] A. C. 151, 166.

is qualified as a factory or workshop by direct description, that part of the inquiry is ended. [His Lordship read s. 4, sub-s. 2, of the Act of 1928, and s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, and continued :] In this case there is a place of refreshment for the persons employed in a laundry which is qualified as a factory or workshop, and therefore is an industrial hereditament. The only persons who resort there are those employed by the appellants, and the case finds that the place "is used solely for the purpose of supplying "hot meals, light refreshments and hot and cold drinks to "workpeople engaged at the said laundry." Taking those facts and applying to them s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, the question is whether this refreshment place, be it messroom or canteen, is "solely used for "some purpose other than the manufacturing process or "handicraft carried on in" the laundry. Quarter sessions have answered that question in the affirmative.

We have been referred to a passage in a judgment of Talbot J., with which Avory J. agreed, in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (1). Talbot J. said, with reference to what Avory J. had previously said regarding the messroom and cookhouse in *Cardiff Revenue Officer* v. *Duncan & Sons* (2) : "I do not think that he intended to say that the "messroom and cookhouse necessarily came out of the indus-"trial part of the building." I read messroom and cookhouse there as meaning the same as canteen. I see no distinction between the two. Talbot J. goes on : "Whether they do or "not must"—some of the reports say "may"—"depend "upon the persons for whose accommodation they are pro-"vided and used : according to whether they relate to the "industrial part, the factory proper, if I may use the term, "or to the clerical and editorial part of the hereditament." That passage clearly suggests that where there is an industrial part and a non-industrial part, the part to which the refreshment place is attached will determine its character. Here there is only one part of this factory apart from this canteen, namely, an industrial part, and the view at which I have

(1) [1931] 1 K. B. 47, 78.

(2) [1931] 1 K. B. 47.

arrived, after feeling some doubt whether we should not treat the decision of quarter sessions as a finding of fact which has been arrived at on proper principles, is that quarter sessions were wrong in law, and, applying the principles laid down by Talbot J. in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (1), and what I may call up-to-date considerations in the equipment and layout of a factory, this canteen is not a place which is "solely used for some purpose other than the "manufacturing process or handicraft carried on in" the laundry.

My view is limited, I need hardly say, to the precise facts of this case, but it may assist in the determination of the character of parts of a factory such as those which have been mentioned—a lavatory, or a room where surgical first aid is provided, or a cloakroom, or a number of other parts of the hereditament. If my decision is relevant on the facts to such cases as those it will no doubt be applied, but, so far as the facts of this case are concerned, I think that quarter sessions came to a wrong decision and the appeal should be allowed.

TUCKER J. The difficulty which I have felt is whether this is not a pure question of fact with regard to which it is difficult to say that quarter sessions have come to a wrong conclusion, but on the whole I agree that, on the facts as set out, a question of law is raised and quarter sessions came to an erroneous decision on it. The element which, to my mind, is decisive is that the facts stated show that the canteen was necessary and essential for the welfare and efficiency of the workers engaged in the admittedly industrial part of the undertaking. It is true that the words in the case are that the appellants consider the canteen necessary for the welfare of the workers and that quarter sessions have not expressly said that they consider it essential, but to say on that account that they have not so found is to take too narrow a view of their finding. Having regard to the whole of the facts as set out, I think it is apparent that in this particular case this canteen was an essential and necessary part of the factory. In the circumstances, the canteen cannot be brought within the exception in s. 149, sub-s. 4 (*a*), of the Factory and Workshop Act, 1901, and, unless it is brought within that provision, it must form part of the industrial hereditament and be treated as such. I, therefore, agree that the appeal should be allowed.

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(1) [1931] 1 K. B. 47.

Appeal allowed.

Solicitors for appellants: *Fletcher, Liddle & Co.*
Solicitors for respondents: *Blundell, Baker & Co.*

R. F. S.

HATHAWAY *v.* TURNER.

1941
Sept. 29.

Revenue—Income Tax—Cessation of office or employment—Additional assessment—Town Clerk—Finance Act, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 45, *sub-s.* 5.

By Finance Act, 1927, s. 45, sub-s. 5: "Where in any year of "assessment a person ceases to hold an office or employment or "to be entitled to . . . . a stipend chargeable under Sch. E, tax "shall be charged for that year on the amount of his emoluments "for the period beginning on April 6 in that year and ending "on the date of the cessation, and, if tax has been charged other-"wise than in accordance with this provision, any tax overpaid "shall be repaid, or an additional assessment may be made, as "the case may require, and if the emoluments for the year ending "on April 5 in the year preceding the year of assessment in which "the cessation occurs exceed the amount on which tax has been "charged for that preceding year in respect of the office, employ-"ment . . . . or stipend, an additional assessment may be made "so that tax shall be charged for that preceding year on the "amount of the emoluments for the said year ending on April 5."

On September 28, 1939, the respondent, who had for several years held the office of deputy town clerk of R., was appointed town clerk of S. The original assessment made on him as deputy town clerk for the year 1938–39 was in the sum of 709*l.*, his remuneration for the preceding year, while his actual remuneration for 1938–39 was 759*l.* On his appointment to the town clerkship an additional assessment in the sum of 50*l.* was made on him under s. 45, sub-s. 5. Income Tax Commissioners discharged the additional assessment on the ground that there was no cessation of employment within the meaning of s. 45, sub-s. 5 :—

Held, that, although respondent continued in his new office to do work similar to that done by him in his previous office, there was nevertheless a cessation of an office or employment within the meaning of s. 45, sub-s. 5, and the additional assessment must be confirmed.

CASE stated by Income Tax Commissioners.

At a meeting of General Commissioners for Income Tax acting in and for the division of Upper Strafforth and Tickhill in the county of York, the respondent, E. L. H. Turner, appealed against an additional assessment of 50*l.* for the year 1938–39 made on him under Sch. E to the Income Tax Act, 1918.

The respondent had successively held the appointments of assistant solicitor to the Leicester corporation, town clerk of Aberystwyth, and deputy town clerk of Rotherham, the last-mentioned office carrying a salary of 700*l.* a year, rising to 800*l.* a year as from January 27, 1939. On September 28, 1939, he was appointed town clerk of Scarborough at a salary of 1000*l.* a year. The original assessment made on the respondent as deputy town clerk of Rotherham for the year 1938–39 was in the sum of 709*l.* (being his remuneration for the preceding year), while his actual remuneration for the year 1938–39 was 759*l.* The additional assessment under appeal was made in the sum of 50*l.*, being the difference between the amount of the original assessment and the actual amount of the respondent's remuneration for the year ending April 5, 1939, on the view that, on his appointment as town clerk of Scarborough, there was a cessation of his office or employment as deputy town clerk of Rotherham within the meaning of s. 45, sub-s. 5, of the Finance Act, 1927.

The commissioners held that there was no cessation of employment and discharged the additional assessment. The inspector of taxes appealed.

R. P. Hills for the appellant : It is obvious that here there has been a cessation of one office or employment and the commencement of another. The nature of the respondent's work in the two offices may be the same, but it is impossible to say that an office or employment under one local authority is the same as an office or employment under another. The commissioners were apparently influenced by the fact that for some unexplained reason the principle of cessation was not applied on the two previous occasions when the respondent transferred his services. The additional assessment should be confirmed.

The respondent in person: It was not the intention of the legislature that in cases where the nature of the work was the same a cessation of an office was to be implied whenever there was a change of employer. Local government officers are entitled to be treated on the same principle as Civil servants who move from one government department to another. The question of cessation is one of fact, and, therefore, one for the commissioners to decide: *May* v. *Falk* (1).

LAWRENCE J. The only question which arises is whether the respondent ceased to hold an office or employment within the meaning of s. 45, sub-s. 5, of the Finance Act, 1927. The commissioners have held that there was no cessation of employment, and they, accordingly, discharged the additional assessment. They appear to have been influenced to some extent by the fact that in previous years the respondent, having been assistant solicitor to the Leicester corporation, was appointed town clerk of Aberystwyth, and again deputy town clerk of Rotherham at a higher salary, and that on neither of those occasions was what the commissioners call the principle of cessation applied. Those facts are, in my opinion, entirely irrelevant, because what the Inland Revenue Commissioners may have thought it right to do on those occasions and in those circumstances does not in any way prevent them from asserting the true principles of law on a subsequent occasion.

The commissioners were also influenced, apparently, by the decision in *May* v. *Falk* (1), on which the respondent principally relies. In that case, a director, who was also secretary, of

(1) (1932) 17 Tax Cas. 218.

the Imperial Tobacco Co., was in receipt of 300*l*. a year as a director and 2500*l*. as secretary of the company. On a certain date he ceased to be secretary and was appointed a member of the executive committee of directors, and as such he received a salary of 5000*l*. a year. On those facts, the employer being the same company, the special commissioners decided that there had been no cessation of office, and Finlay J. upheld that decision, holding that there was some evidence to support the commissioners' decision. Those facts are entirely different from those of this case, principally because there the employer was the same. Here the employer is different. The respondent, who strongly relied on that case, said that it was decided on a question of fact, and, that Finlay J. had thought himself bound by that decision on the question of fact, and that, therefore, I ought to regard myself as bound by the decision of the commissioners in this case.

The Crown relied on a case in the Court of Session, *Thomas* v. *Inland Revenue Commissioners* (1). There the taxpayer was employed at first at a certain salary and in certain circumstances. Then the firm who employed him was turned into a limited company, and he was employed by the limited company at a different remuneration and with certain extended duties. The general commissioners decided that there had been a cessation of his office. The majority of the Court of Session held that the mere fact that there had been a change of employer was sufficient to establish that there had been a cessation of employment, but Lord Carmont dissented on that point, although he agreed that on the other facts there had been a cessation of employment. The respondent contends that that case is distinguishable from the present and that it is consistent with his main contention, which is that the matter is a question of fact, and that the decision of the commissioners ought, therefore, to be affirmed. He also draws attention to the fact that Lord Carmont dissented on the question of law, or of fact and law, that a fresh employer constitutes fresh employment. He also distinguishes the case on the ground that the work which the taxpayer was carrying out there was

(1) (1941) Tax Leaflet No. 1111.

different from the work he had previously done, and he contends that the work which he performs as town clerk of Scarborough is substantially the same as the work that he did as deputy town clerk of Rotherham. Further, he relies on the fact, which he alleges to be true, that Civil servants of the Crown are not treated as ceasing to hold their office and holding a new office when they change their offices under the Crown. As to that, there is nothing in the case about it, and I have not been informed what is the practice. I think the matter is irrelevant.

In my opinion, the argument that the respondent is carrying on the same work as he did before going to Scarborough is not well founded. The fact that it is similar in its nature is not the same as saying that it is the same work, and I am of opinion that the majority in the Court of Session were right in holding that when a man ceases to hold an office or employment under one employer and takes up an office or employment under another employer he must cease to hold the office or employment under the first employer. It is clear from r. 6 (*j*) of Sch. E that offices or employments of profit under a local authority are offices or employments of profit which have to be taxed under Sch. E, and it is impossible, in my opinion, to say that a person who has ceased to be employed under a certain local authority has not ceased to hold the office or employment of profit which he was holding under that authority.

I am, therefore, of opinion that the facts of this case are such that it was impossible for the commissioners as a matter of law to hold that the respondent had not ceased to hold the office of deputy town clerk of Rotherham within the meaning of s. 45, sub-s. 5, of the Finance Act, 1927, and the appeal must be allowed, with costs.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

A. W. G.

C. A.
1941
Oct. 17, 20.

WOOLFALL AND RIMMER, LIMITED *v.* MOYLE AND ANOTHER.

Insurance (Employers liability)—Employer indemnified against liability to injured workmen at common law and by statute—Condition requiring employer to "take reasonable precautions to prevent accidents"—Construction—Condition applicable to personal neglect of employers only—Statement in proposal as to condition of plant—Condition at time of statement only referred to.

By a policy of insurance underwriters agreed to indemnify the plaintiffs in respect of their liability at common law or by statute to compensate employees injured by accident in the course of their employment. The policy made the observance of certain conditions a condition precedent to the liability of the underwriters, and condition 5 was: "The assured shall take reasonable "precautions to prevent accidents . . . ." The policy incorporated as the basis of the contract a proposal form completed by the plaintiffs. Question 2 (*c*) in the form was: "Are your "machinery, plant and ways properly fenced and guarded, and "otherwise in good order and condition." To this question the plaintiffs answered "Yes":—

Held, that, on its true construction, condition 5 applied only to the personal acts of the plaintiffs and that where the plaintiffs had entrusted work to a trustworthy and skilled foreman who had been in their employment for many years they were not debarred by the condition from being indemnified by the underwriters in respect of compensation recovered against them under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and the Workmen's Compensation Acts, 1925 to 1931, by workmen who had received injuries in an accident resulting from the negligence of the foreman.

Held, also, that the answer to question 2 (*c*) in the proposal form applied only to the condition of the machinery, plant and ways at the date when the answer was made.

APPEAL from Asquith J.

The plaintiffs carried on the business of electrical engineers, electricians, painters and decorators, and the defendants were Lloyd's underwriters. By an Employers' liability policy dated June 7, 1939, wherein it was recited that the plaintiffs had made a written proposal and declaration dated May 26, 1939, which it was thereby agreed were the basis of the contract and to be considered as incorporated therein, the defendants agreed to indemnify the plaintiffs from May 30, 1939, to May 29, 1940, in the following manner: "That if "at any time during the said period, any employee in the "employer's immediate service shall sustain any personal "injury by accident . . . . while engaged in the service of "the employer, in work forming part of or process in the "business . . . . and in case the employer shall be liable to "make compensation for such injury, either under or by virtue "of the common law, the Fatal Accidents Act, 1846 (9 & 10 Vict. "c. 93), the Employers' Liability Act, 1880, the Workmen's "Compensation Acts, 1925 to 1931, ... we the underwriters "shall indemnify the employer against all sums for which the "employer shall be so liable, and will, in addition, be responsible "for all costs and expenses incurred with our consent in "connection with any claim for such compensation . . . . "Provided always that the due observance of the under-"mentioned conditions shall be a condition precedent to the "liability of the underwriters under this policy." Condition 5 of the conditions provided: "The assured shall take "reasonable precautions to prevent accidents and to comply "with all statutory obligations."

On October 25, 1939, workmen of the plaintiffs were employed in painting the inside of the roof of a factory. Scaffolding had been erected with planks on which the men stood. At a point where five workmen were standing on a plank it gave way, with the result that one workman was killed and three others were injured. In consolidated actions the dependants of the deceased workman and two of the injured workmen recovered from the plaintiffs damages under the Employers' Liability Act, 1880, amounting to some 1300*l*. and costs, and the remaining workman received compensation under the Workmen's Compensation Acts at the rate of 1*l*. 10*s*. a week from the date of the accident. The plaintiffs brought this action against the underwriters claiming to recover under the policy these sums and the costs incurred by them in defending the employees' actions. The underwriters resisted the claim on two grounds: (1.) that a question on the proposal form had been wrongly answered, and (2.) that condition 5 of the policy had not been complied with in that a plank had been used which was defective and of insufficient strength.

The question in the proposal form which was said to have been inaccurately answered was: "2 (*c*). Are your machinery, "plant and ways properly fenced and guarded and otherwise "in good order and condition?" To this the answer given was "Yes." The underwriters did not allege that this answer was inaccurate at the time it was made, but maintained that the plaintiffs were under a duty to inform them if it ceased in any way to be true. It was conceded by the plaintiffs that their foreman, named Gaskell, was negligent in using the plank, but they contended that they had complied with condition 5 and used all reasonable care by employing Gaskell, who was a skilled man and had been in their employment for thirty-three years, to select the planks to be used for the scaffolding and to superintend the erection of the scaffolding. As regard question 2 (*c*) in the proposal form, they contended that their answer only applied to the condition of things at the time it was given.

Asquith J. said, with regard to question 2 (*c*), that he thought that the phrase "otherwise in good order or condition" must be construed ejusdem generis with the preceding words "properly fenced and guarded," and, therefore, was intended to ask whether some precaution similar to fencing or guarding had been omitted in relation to the plant or some part of it such as the plank. The use of too weak a plank did not, on this view, prevent the plant from being "otherwise in good "order and condition." But if he was wrong in that, he held that the time to which the question had referred was when the proposal form was filled in and there was no evidence that the answer to the question was on that view untrue. As to condition 5, it had been urged that it was invalid as being repugnant to the policy, in so far as the policy covered liability for negligence. The condition could, however, be reconciled with the risks covered by the policy if, for there to be a breach of it, there must have been personal negligence by the plaintiffs as opposed to vicarious negligence. In his view, there had been no breach by the plaintiffs of their personal obligation to provide proper plant and a reasonably safe working system. Judgment must, therefore, be given for the plaintiffs.

The underwriters appealed.

Beney and *Spafford* for the underwriters. The underwriters are protected by condition 5, which, even when it is given its widest meaning, is not irreconcilable with the main provisions of the policy, for some cases of common law liability of the plaintiffs would still be covered. That would depend on whether there had been negligence by the plaintiffs. Thus, a defect in machinery might cause an accident without involving negligence on their part, but that would be totally different from an accident resulting from the use by one of their own workmen of a defective plank in constructing scaffolding, which is the present case. [They referred to *Smith* v. *Charles Baker & Sons* (1). It cannot have been a sufficient compliance with condition 5 for the plaintiffs to leave everything in regard to the material used in the scaffolding and its erection to one man.

[LORD GREENE M.R. Do the underwriters say that the obligation to take reasonable precautions extends not only to the personal acts of the plaintiffs, but also to the acts of everyone employed by them ?]

The underwriters do not go so far as that. The condition only applies to the plaintiffs in so far as in law they are responsible towards their workmen. Under this policy the assured must take reasonable care to prevent accidents giving rise to claims at common law or by statute and when they delegate their authority they are in default if the delegate fails to take reasonable care. It is not enough for the plaintiffs to say that they handed over the work to a man whom they had every reason to think trustworthy. [They referred to *Concrete, Ld.* v. *Attenborough* (2), *Pictorial Machinery, Ld.* v. *Nicolls* (3) and *National Farmers' Union Mutual Assurance Society* v. *Dawson* (4). With regard to the answer in the proposal form, Asquith J. was wrong in limiting the meaning of the words "otherwise in good order and condition" by applying the ejusdem generis rule. He also held that the answer to question 2 (*c*) only referred to the state of things at the time when it was signed, but when the group of questions in the form is considered it is apparent that they do not deal with the present time only. The whole point of question 2 (*c*) was to discover the nature of the risk which the underwriters were being asked to undertake and for that purpose it was valueless if the question were treated as applying only to the day when it was answered.

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(1) [1891] A. C. 325.
(2) (1940) 65 Ll. L. Rep. 174, 179.
(3) (1940) 67 Ll. L. Rep. 461.
(4) (1941) 70 Ll. L. Rep. 167.

Sellers K.C. and *H. I. Nelson* (for *Nield*, on war service) for the plaintiffs, were not called upon.

LORD GREENE M.R. Two points arise in this appeal and I will take the second point first. The policy, which insures the plaintiffs against liability to their workmen either at common law or under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, or the Workmen's Compensation Acts, contains a reference to the written proposal and declaration by the plaintiffs which it is agreed are the basis of the contract and are to be considered as incorporated therein. The proposal form is a printed document described as "Employers' Liability Policy at Lloyd's," and in it are asked a number of questions with regard to the circumstances in which the workmen are going to be employed. One of the questions is: "Are your machinery, plant and ways properly "fenced and guarded and otherwise in good order and "condition?" The plaintiffs' answer to that question was: "Yes." It is argued in this court, as it was argued before Asquith J., that that question means a great deal more than it professes on the face of it to ask. It is said that it does not merely relate to the moment of time at which the proposer answers it, but that it extends to the future condition of the machinery, plant and ways, during the currency of the policy.

In my opinion, there is not a particle of justification for reading into that perfectly simple question any element of futurity whatsoever. The argument that the court should read into it such an element was based, as I understood it, on the suggestion that the answer would be valueless from the underwriters' point of view unless that were done. I entirely disagree. The value of the question to the underwriters, as I construe it, is that it enables them to find out with what sort of person they are dealing, that is, whether or not he keeps his machinery, plant and ways properly fenced and guarded and otherwise in good order and condition. Obviously, if he was careless about that, so that at the time the question was answered his machinery, plant and ways were not in good order and condition, the risk would be of a different character. If the underwriters intended to refer to the future, it is most unfortunate that a printed document of this kind, tendered by Lloyd's underwriters to persons desiring to insure with them, should not be so expressed. Had they intended that this question should carry the meaning which they now suggest, nothing would have been easier than to say so. If they did not mean it, I am at a loss to understand how the point comes to be taken. In my judgment, the meaning of this question is perfectly clear and there is no evidence that the plank which was the cause of this accident was not in good order and condition at the time when the question was answered, or, indeed, that it was then in the possession of the plaintiffs. I should add that Asquith J. construed the words " and otherwise in good order and condition " as referring to some condition of the plant ejusdem generis with fencing and guarding, and he, accordingly, held that the question did not apply in any case to scaffolding materials such as we have to deal with here. We have not heard Mr. Sellers and, accordingly, it would not be right to say more about that view of the learned judge than that it is one which, at first sight, appears to me to be difficult to support.

I now come to the really important point in the case which arises on the construction of one of a series of clauses described in the policy as "conditions," the observance of which is said to be a condition precedent to the liability of the underwriters. I do not pause to inquire whether the phrases "condition" and "condition precedent" are accurate phrases, and if I refer to this as a "condition" it is without prejudice to that question. The particular condition which is in issue here is in the following terms: "The assured shall take reasonable "precautions to prevent accidents and to comply with all "statutory obligations." In approaching the construction of that condition it is important to remember the context in which it is found. A duty to take care arises by virtue of the relationship between the person on whom such a duty lies and the person towards whom it is to be discharged. That relationship may arise by contract, or it may arise by operation of law through two persons being thrown into a particular relationship to one another. In the present case the duty which this condition purports to impose is a contractual duty imposed on the plaintiffs towards the underwriters, who are indemnifying the plaintiffs against a variety of risks, an important proportion of which arise in cases of negligence either by the plaintiffs themselves or by persons for whose negligence they are vicariously responsible to their employees. There are, in the many classes of risks which are covered, some, and, no doubt, very important ones, in respect of which a workman can recover from his employer without the necessity of establishing negligence. On the other hand, there are a multitude of risks covered in which the workman must establish negligence if he is to succeed. One of those risks is that of accident to a workman from some act or default of an employee of the assured where, but for the Employers' Liability Act, 1880, common employment would have afforded a good defence.

The argument that was presented to us with great skill and ingenuity by Mr. Beney was that the condition in question imposed on the plaintiffs a duty to take care co-terminous with and similar in quality to the obligation to take care which lies on an employer vis-a-vis his workmen. In my judgment, that is the wrong method of approach to this question. The effect of Mr. Beney's argument would be to exclude from the scope of the indemnity which the policy purports to give a very large and important class of case which in the body of the policy is expressed to fall within it. It is true that the document must be read as a whole, and that wide and comprehensive words of obligation imposed on the underwriters in the body of the policy may be cut down by subsequent clauses in the document, but, quite apart from any question of repugnancy—and I very much doubt whether that word is really applicable in this case—I consider that a policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance which any employers would obviously wish to get, and which is at the outset given in wide terms, is to be eliminated by a "condition" tucked away at the end of the policy in the context in which this condition is found, for, be it observed, all the other conditions relate to matters of comparatively minor importance. Condition 1 deals with the necessity of giving notice, and condition 2 with the question of employers making payments or admissions of liability, power being given to the underwriters to use the name of the employers. Condition 3 is connected with the fixing of the premium. Condition 4 excludes from indemnity liability to employees of sub-contractors, and then, according to the argument presented to us, condition 5 cuts down the operative and main words of the policy to a surprising extent. I approach a document of this kind, and, I think, properly approach it, with a strong desire to avoid such a result if the language used legitimately permits of it. If the construction which is urged on behalf of the underwriters is right, I do not think it would be an exaggeration to say that this document is really a trap for the assured. By that expression let it not be thought that I mean to imply that a trap was intentionally set. I mean nothing of the kind. All I mean is that the underwriters, if their intention was to limit their risk in the way in which Mr. Beney would have it limited, have used language which entirely fails to make that intention clear. I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is. They should, with the aid of competent advice, make up their minds as to the qualifications they wish to impose and should express their intention in language appropriate for achieving the result desired. There is no justification for underwriters who are carrying on a widespread business and making use of printed forms, either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language. Any competent draftsman could carry out the intention which Mr. Beney imputes to the document, and, if that was really intended, it ought to have been done.

Having said that—and I should be happy to think that these policies would, in the future, be more carefully drafted—I turn to what appears to me to be the short answer to the point. It appears that the plaintiffs, who are a limited company, employed a foreman who was obviously a competent and skilled man, and reasonably and rightly relied on by the plaintiffs. They employed him, not merely to see that the company was provided with appropriate scaffolding material, but also to select from the stock in hand at any moment material which would be suitable for any particular job. It is, in my view, rightly conceded by Mr. Beney that, in entrusting to this foreman the task of providing suitable and safe material for scaffolding and selecting suitable material for a particular job, the plaintiffs were taking a reasonable precaution within the meaning of condition 5. No doubt, vis-a-vis a workman injured through the negligence of the foreman, that would not be a sufficient answer to a claim, but this seems to me to be irrelevant, because the question we have to answer is: What is meant by a "reasonable precaution" in this document and as between these two parties. Mr. Beney, having conceded what I have mentioned, then wished to construe the condition as importing the element of what, for shortness, I have called vicarious responsibility. He says that, notwithstanding that the selection of a competent foreman for the purposes stated is the taking of reasonable precautions, the plaintiffs are in breach of the condition if that foreman is in fact negligent in carrying out the task entrusted to him—in other words, that the condition has the effect of imposing on the plaintiffs the burden of a guarantee of the diligence of the foreman in the performance of the task which they have reasonably entrusted to him. That seems to me to be completely inadmissible. If the delegation was reasonable, and, if, in selecting that foreman to perform the task, the plaintiffs took reasonable precautions, their obligation under this condition was, in my opinion, at an end. It is inconsistent to say that the delegation was reasonable and at the same time that negligence on the part of the delegate deprives the plaintiffs of the benefit of the policy under this condition. Mr. Beney says that unless that construction is put on the condition it is wholly valueless. I entirely disagree. It seems to me that there is ample scope for the operation of the condition construed in the way in which I would construe it, and, what is more, a scope which gives every reasonable business protection. The fallacy seems to me to lie in importing into this condition all the matters which are relevant in considering liability based on the negligence of an employer towards his workman. As between employer and workman, particularly in cases which fall under the Employers' Liability Act, 1880, the employer can be made liable for negligence in law by reason not only of a personal default of his own but also of the negligence of a fellow employee, but I see no reason for importing that conception into the obligation which the assured undertake towards the underwriters by this condition. It seems to me that the language is perfectly satisfied by their taking such reasonable precautions as would satisfy a test of reasonableness as between assured and underwriter. As I have said, it was eminently reasonable for the plaintiffs to entrust the tasks to which I have referred to a skilled and trusted foreman on whose competence they have every reason to rely. That being so, I need not go into any matters beyond the actual facts of this case.

It will be seen that my method of approach to the problem is not quite the same as that followed by the learned judge. He did not, I think, refer to the matter to which I have referred, namely, the relationship of assured and underwriter as bearing on the meaning of such a condition as this, but the result to which he came is the same. In consequence, the appeal, in my opinion, should be dismissed with costs.

GODDARD L.J. I agree.

On the point arising on the proposal form it is unnecessary for me to add anything to that which has fallen from the Master of the Rolls. A perfectly simple question is asked, whether the machinery and plant are in good condition, and the answer is " Yes, it is." It is unarguable to maintain that that refers to the future. I agree also with the Master of the Rolls in thinking that one cannot take the view which Asquith J. took, namely, that the ejusdem generis rule of construction should be applied to the words " otherwise in good order and "condition," and those words construed only as referring to fencing and guarding. I do not see any reason for that, but the contention raised by the underwriters on the proposal form fails for the other reason which I have mentioned.

I desire to add a few words with regard to condition 5. The first thing to notice is that the policy insures the plaintiffs, among other things, against their common law liability for negligence, that is to say, their personal negligence, and also against liability for what has been called their vicarious negligence, that is to say, the negligence of their servants. The condition is: " The assured shall take reasonable "precautions to prevent accidents and to comply with all "statutory obligations." I leave out of account the words "and to comply with all statutory obligations," because they are put in a category by themselves, and I consider the condition as though it simply said: " The assured shall take reasonable "precautions to prevent accidents." If we were to read that condition in the way in which Mr. Beney has invited us to read it, it would follow that the underwriters were saying: "We will insure you against your liability for negligence on "condition that you are not negligent," because, if the plaintiffs had taken all reasonable precautions to prevent accidents in the widest sense, they could not be liable in negligence. The fallacy which underlies Mr. Beney's contention becomes apparent when it is borne in mind that we are here construing words in a contract between underwriters and assured and not words in a contract between employer and employed. When that is appreciated it becomes reasonably clear that condition 5 is introduced for the protection of the underwriters, to limit the field of their liability to the extent that they must be regarded as saying: " We will insure you "against the consequences of your negligence, but please "understand that we do so on the footing that you are not to "regard yourselves as free to carry on your business in a "reckless manner, but that you must take the reasonable "precautions to prevent accidents which ordinary business "people take, that is to say, you are to run your business in "the ordinary way and not in a way which invites accidents." If an employer provided no lights where there were stairs which could not be seen in the dark, or failed to provide fencing where, if there were no fencing, it would be reasonable to expect people to fall, or if in his business he used explosives and left them about where any youth who was employed could tamper with them and cause damage and destruction, I think it could be said that he was not taking reasonable precautions to prevent accidents, but, in my opinion, it is fallacious to read this condition as meaning that the underwriters are to be excused from indemnifying the assured if they are guilty of any breach of the duty which the law imposes as between employer and employed in not taking some precaution which a jury or a court think ought to have been taken, and so become liable to the employed for negligence. That would be granting an indemnity with one hand and taking it away with the other. A perfectly satisfactory meaning can be given to this condition in the light of the fact that it occurs in an undertaking between underwriters and assured, and, in my opinion, it ought not to be construed in the way for which the underwriters have contended.

I do not entirely agree with the reasoning of Asquith J. in this case or with all the dicta of Branson J. in *Concrete, Ld.* v. *Attenborough* (1), but for the reasons which I have stated I agree that this appeal should fail.

DU PARCQ L.J. I agree. As we are told that condition 5 in this policy is similar to conditions in many other policies, I should like to say a few words about it. In my view, and I do not think I disagree in this respect with my Lord or with Goddard L.J., there is no complaint to be made about this condition. It seems to me to be plain and not to present any serious difficulty, but a legitimate ground for complaint is that it should be sought to make it mean something which on the face of it it does not mean. Any business man observing this condition would understand that he, the assured, must take reasonable precautions. In the present case the assured say—I leave out of account the fact that they are a company, for the principle is the same as if they were individual employers: "We have taken all reasonable precautions. We selected an "admittedly competent and experienced man to choose the "materials for the work. We never stinted him or refused "any application he made for materials. We left the task of "selection to him, he being much more fitted to do it than we "were." That seems to be a complete and satisfactory answer. But then it is said: "Unfortunately, the competent man whom "you employed was on one occasion negligent and you are "vicariously responsible for his negligence, and, as he omitted "a reasonable precaution in carrying on your business and in "providing for the safety of your workmen, you must be said "not to have taken reasonable precautions as between "yourselves and the insurers." I agree that that argument rests on a complete misconception. The plaintiffs never warranted that everybody whom they employed would take reasonable precautions, or, indeed, that anybody except themselves would take reasonable precautions, and they took reasonable precautions. It is not right to say that they delegated to another the duty which they owed to the underwriters. In its nature that is a duty which they cannot delegate, and when they appointed another person to see that provision was made for the safety of their workmen they were not delegating their duty to take reasonable precautions, but were performing it.

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(1) (1940) 65 Ll. L. Rep. 174

On these grounds I agree with the conclusion at which the learned judge arrived, although I think that perhaps he might have arrived at it by a simpler and more satisfactory road.

Appeal dismissed.

Solicitors for the defendants: *Barlow, Lyde & Gilbert.*

Solicitors for the plaintiffs: *Brown, Turner, Compton Carr & Co., London and Southport.*

H. C. G.

CROCKER *v.* HADLEY.

C. A.
1941
Oct. 13.

County court—Appeal—Interpleader—Value of goods claimed less than 20*l.—Claim by claimant for damages for wrongful distress—Dismissal of claim for damages—No right of appeal without leave—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105 (*c*).

A judgment creditor in a county court obtained leave to issue execution and goods of the value of 12*l.* 10*s.* were seized. The wife of the judgment debtor claimed the goods and an interpleader was ordered. The claimant also claimed damages limited to 100*l.* for trespass, wrongful distress, and conversion against the judgment creditor and the registrar of the county court. The judge found in favour of the claimant on the interpleader, but he dismissed her claim for damages. No leave to appeal was asked or granted. The claimant appealed against the dismissal of her claim for damages :—

Held, on a preliminary objection, that the claim for damages was part of the "proceedings in interpleader," and that, since the goods seized were under 20*l.* in value, s. 105 (*c*) of the County Courts Act, 1934, applied, and no appeal lay without leave of the county court judge.

Lumb v. *Teal & Co.* (1889) 22 Q. B. D. 675 approved.

APPEAL from His Honour Judge Topham K.C. at Portsmouth County Court.

On May 16, 1940, the first respondent, Albert Edward Hadley, obtained judgment in an action brought by him in Portsmouth County Court against Coleman Crocker. The judgment debt and costs amounting to 9*l.* 18*s.* 6*d.* remained unpaid, and on July 17, 1940, the first respondent obtained leave to issue execution and the bailiff seized goods of an appraised value of 12*l.* 10*s.* The claimant, Mrs. Crocker, wife of the judgment debtor, claimed the goods as her property, and she also issued a plaint claiming damages limited to 100*l.* for trespass, wrongful distress, and conversion against the first respondent and the second respondent, the registrar of the county court. An interpleader summons was issued and the judge found that the goods were the property of the claimant, but he dismissed her claim for damages, and stated that, if he had found her entitled in law to any damages, he would have awarded ¼*d.* No leave to appeal was asked or given. The claimant appealed against so much of the judgment as dismissed her claim for damages.

J. Scott Henderson for the respondent registrar took a preliminary objection. No appeal lies without leave. The claim for damages was a claim in the interpleader proceedings, and since the value of the goods seized was below 20*l.*, s. 105 (*c*) of the County Courts Act, 1934 (1), applies. A claim for damages arising out of an alleged wrongful seizure of goods is clearly treated as being in the interpleader proceedings by Order XXVIII., r. 11, of the County Court Rules (2). This case is exactly covered by *Lumb* v. *Teal & Co.* (3). That was a decision of the Divisional Court on s. 120 of the County Courts Act, 1888, which is reproduced, with only minor verbal amendments, in s. 105 of the Act of 1934.

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(1) County Courts Act, 1934, s. 105: "If any party to any "proceedings in a county court is "dissatisfied with the determina-"tion or direction of the judge in "point of law or equity or upon "the admission or rejection of any "evidence, the party aggrieved "by the judgment, direction, "decision or order of the judge "may appeal therefrom to the "Court of Appeal . . . . Pro-"vided that, without the leave of "the judge, there shall be no "appeal . . . . (*c*) in proceedings "in interpleader where the money "claimed, or the value of the goods "or chattels claimed or the pro-"ceeds thereof, does not exceed "20*l.*"

Sect. 133, sub-s. 1: "If a "claim is made to or in respect of "any goods or chattels seized in "execution under process of a "county court, ... the registrar "may, as well before as after any "action brought against him, "issue a summons calling before "the court the party at whose "instance the process issued and "the party making the claim."

Sub-s. 2: "Upon the issue of "the summons, any action "brought in any county court or "other court in respect of the "claim or of any damage arising "out of the execution of the "warrant shall be stayed."

Sub-s. 3: "On the hearing of "the summons, the judge shall "adjudicate upon the claim, and "shall also adjudicate between "the parties or either of them "and the registrar upon any "claim to damages arising or "capable of arising out of the "execution of the warrant by the "registrar . . . ."

(2) County Court Rules, 1936–40, Order XXVIII., r. 11: "Where in the interpleader pro-"ceedings the claimant claims "damages from the execution "creditor or from the registrar "in respect of the seizure of the "goods, he shall, in the particulars "of his claim to the goods, state "the amount he claims for "damages, and the ground on "which he claims damages."

(3) (1889) 22 Q. B. D. 675.

Though it does not bind this court, it has stood unchallenged for fifty-two years, and it is submitted that it is right.

Horner, for the respondent execution creditor, did not argue.

G. O. Slade for the claimant. I am taken by surprise by this point and have had no opportunity of considering *Lumb* v. *Teal & Co.* (1). If its effect is what is suggested, it is wrong, and this court ought to overrule it. A claim for 100*l.* damages by itself carries a right of appeal without leave, and the claimant ought not to lose that right and be shut out from appeal unless the judge chooses to give leave merely because her cause of action arises out of an execution in respect of which an interpleader has been ordered. The claim for damages does not arise "in proceedings in interpleader" within the meaning of s. 105 (*c*) of the Act. It is a separate proceeding, which, as a matter of convenience, is heard at the same time as the interpleader proceedings.

MacKinnon L.J. [after stating the facts and referring to the relevant sections and rule:] I am satisfied that this matter comes within s. 105 (*c*) of the Act, as an appeal "in "proceedings in interpleader." The value of the goods claimed admittedly did not exceed 20*l.*, and, therefore, it was necessary for the claimant to obtain leave to appeal. No such leave was granted, and this appeal is not in order. In fact, precisely the same point was decided by a Divisional Court, as long ago as 1889, in *Lumb* v. *Teal & Co.* (1), under the corresponding section of the County Courts Act, 1888. Mr. Slade asks us to say that that case was wrongly decided. I think that it was quite rightly decided. I am told by my brother Luxmoore that the same point was inferentially decided much more recently in this court in *West* v. *Automatic Salesman, Ld.* (2). It is, however, not necessary to refer to those authorities, because I think that, apart from authority, this preliminary objection succeeds, and the appeal must be dismissed.

Clauson L.J. I agree.

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(1) 22 Q. B. D. 675.

(2) [1937] 2 K. B. 398.

C. A.
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CROCKER
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LUXMOORE L.J. I agree.

Appeal dismissed.

Solicitors for respondent registrar: *Gibson & Weldon, for Hobson Thomas, Sherwell & Wells, Cosham, Hants.*

Solicitors for execution creditor: *Cousins & Burbidge, Southsea.*

Solicitor for appellant: *Lucien Fior.*

J. W. H.

1941
Oct. 1.

HENRIKSEN (INSPECTOR OF TAXES) *v.* GRAFTON HOTEL, LIMITED.

Revenue—Income tax—Profits or gains—Deductions—Licensed premises—Monopoly value—Instalments paid by tenant under agreement with landlord—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 14—*Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D; Rules applicable to Cases I. & II., r.* 3.

Tenants of licensed premises, by agreement with the landlord, paid by instalments the monopoly value fixed by the licensing justices when granting the licence under s. 14 of the Licensing (Consolidation) Act, 1910. In computing their profits for the purposes of income tax they claimed to deduct, as disbursements wholly and exclusively laid out for the purposes of their trade, the amount of the instalments:—

Held, that sums paid as monopoly value as a condition of the grant of a licence were of the nature and quality of capital payments and not deductible, and the fact that the tenant contracted to pay the instalments did not alter their quality or nature so as to make them charges on income.

Kneeshaw v. *Abertolli* [1940] 2 K. B. 295 followed.

CASE stated by General Commissioners of Income Tax.

At a meeting of General Commissioners of Income Tax for the division of St. Margaret and St. John, Middlesex, on April 12, 1940, Grafton Hotel, Ld., appealed against the following assessments made on them under Sch. D to the Income Tax Act, 1918, in respect of the profits of their trade of licensed hotel and victualling house proprietor, carried on by them at the Grafton Hotel, Tottenham Court Road, London—(*a*) for the year ended April 5, 1939, in the sum of 4805*l.*, less 704*l.* wear and tear; and (*b*) for the year ended April 5, 1940, in the sum of 3750*l.*, less 550*l.* wear and tear. The sole ground of the company's appeal was that in the computation of the profits assessed no deduction had been made for instalments of monopoly value paid by the company under s. 14 of the Licensing (Consolidation) Act, 1910, and amounting to 190*l.* in each of the company's years of account ended on June 24, 1937, and June 24, 1938, on the profits of which the assessments for 1938-1939 and 1939-1940 were based.

The company were at all material times in possession of the premises under a lease dated November 30, 1931, and made between the company and Associated London Properties, Ld. By that lease the company covenanted (inter alia) to pay all charges which might be imposed in respect of the licences necessary for keeping open the premises as a fully licensed hotel. On March 14, 1934, the licensing justices, on an application by the company for a re-grant of a licence for three years which had been granted in 1931, granted to the company a second licence for the period from July 5, 1934, to July 5, 1937, and imposed as monopoly value the sum of 570*l.*, payable in three instalments of 190*l.* on October 1, 1934, October 1, 1935, and October 1, 1936. The instalment payable on October 1, 1936, was that to which the appeal for 1938-1939 related. On March 10, 1937, the licensing justices granted the company a third licence for the period from July 5, 1937, to July 5, 1940, subject to a further payment of 570*l.* as monopoly value by three yearly instalments of 190*l.*, the first of those payments on October 1, 1937, being that to which the appeal for 1939-1940 related.

The commissioners decided that the payments were deductible, and the Crown appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. Payments in respect of monopoly value are capital payments, whether they are made in a lump sum or by instalments.

The monopoly value represents the increase in the value of the premises due to the granting of the licence, and is, therefore, an increase in the capital value. It has been laid down by a long series of authorities that sums paid as monopoly value are capital payments, e.g., in *Kneeshaw* v. *Abertolli* (1), the facts of which are indistinguishable from those of the present case. They also referred to *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co., Ld.* (2); *Rex* v. *Customs and Excise Commissioners* (3); *Rex* v. *Taylor*; *Rex* v. *Amendt* (4); *Appenrodt* v. *Central Middlesex Assessment Committee* (5); *Green* v. *Favourite Cinemas, Ld.* (6); and *Eastmans, Ld.* v. *Shaw* (7).

S. Pascoe Hayward for the company. *Kneeshaw* v. *Abertolli* (1) is not conclusive of this case, because there is nothing to show whether the licensee there was the tenant or the owner of the premises. If in the present case the company were the owners, their position might be difficult, but the payments made by the company are indistinguishable from payments of rent. The company are under contractual liability to the landlord to make those payments and they are bound to do so to maintain and carry on their trade. If the company paid the instalments through the landlord in the form of a higher rent they would undoubtedly be entitled to deduct them in computing their profits for assessment. By making the payments the company do not acquire any capital asset of a permanent value. The question whether these sums are capital payments should be decided from the point of view of business and accountancy practice. So looked at, they are clearly trade outgoings and, therefore, deductible. In *Inland Revenue Commissioners* v. *Adam* (8) the Lord President laid down the tests to be applied, and applying them to the facts of this case it is plain that these instalments were not capital payments.

(1) [1940] 2 K. B. 295.
(2) [1913] A. C. 650.
(3) [1913] 3 K. B. 483; C. A. [1914] 2 K. B. 390.
(4) [1915] 2 K. B. 593.
(5) [1936] 2 K. B. 447; C. A. [1937] 2 K. B. 48.
(6) (1930) 15 Tax Cas. 390.
(7) (1928) 14 Tax Cas. 218.
(8) (1928) 14 Tax Cas. 34, 40.

LAWRENCE J. This is an appeal from General Commissioners, who have decided that Grafton Hotel, Ld., were entitled to deduct, for income tax purposes, the sums which were paid by them in respect of the monopoly value of licensed premises of which they were lessees.

In *Kneeshaw* v. *Abertolli* (1) I decided that a sum paid as monopoly value on the grant of a licence in respect of licensed premises was a capital payment and could not be deducted in an assessment to income tax. I followed a number of decisions on the nature of a payment for monopoly value by various courts and the House of Lords, but not on the question what was a capital payment for the purposes of income tax. Mr. Hayward admits that it would be difficult to distinguish *Kneeshaw* v. *Abertolli* (1) from the present case, except that it does not appear, either from the special case or from the report, whether the licensee was the owner or the tenant of the premises. In the present case the company are the lessees of the premises, and they have paid the instalments of monopoly value in pursuance of a clause in the lease which provided: "The tenants will pay all charges which may be imposed in "respect of the said licences or any of them by virtue of the "Licensing (Consolidation) Act, 1910, or any amendments "thereof, and in default the landlords may pay all such costs "charges and expenses; any moneys expended by them "for that purpose shall be repayable by the tenants on demand "and may be recovered by action forthwith."

Mr. Hayward contends that the payments which were made by the company in pursuance of that clause were made by them under a contractual liability and for the purposes of their trade. He says that the tenants might just as well have agreed with the landlord that the landlord should bear the payment of the monopoly value and that the rent should be increased correspondingly, in which case the lessees would undoubtedly have the right to deduct, for the purposes of income tax, the amount of the rent. It appears to me, however, that for income tax purposes it is impossible to disregard the form in which the lease is framed. It is clear

(1) [1940] 2 K. B. 295.

on all the authorities that no sum of a capital nature which is paid by a trader is deductible for income tax purposes, and, therefore, it is necessary to see whether the sum which the lessees paid is of a capital nature or not. If it were rent, no doubt it would not be a payment of a capital nature, but it is not rent, and they and their landlord have not agreed that they shall simply pay a rent for the premises. What they have agreed is that the lessees shall bear the charges imposed in respect of monopoly value under the Act of 1910. It is also clear from the authorities to which I alluded in *Kneeshaw* v. *Abertolli* (1), and from the fact that a payment in respect of monopoly value, although made by instalments, is imposed as a lump sum and as a condition of the grant of the licence, that such a payment is of a capital nature and quality, and it seems to me impossible to hold that because the tenant undertakes to make that payment its nature and quality are altered and that it becomes a charge on income.

For these reasons I am of opinion that there is no distinction which can be made between the present case and *Kneeshaw* v. *Abertolli* (1) to my decision in which I adhere. The appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the company: *Bower, Cotton & Bower.*

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(1) [1940] 2 K. B. 295.

A. W. G.

REX *v.* SECRETARY OF STATE FOR HOME AFFAIRS.

Ex parte GREENE.

C. A.

1941

July 15, 16, 30.

Emergency legislation — Detention of person — "Hostile origin or "associations"—Discretion of Home Secretary—Habeas corpus—Liability of Home Secretary to produce information on which detention order made—Validity of order—Onus of proof—Need of affidavit by Home Secretary—Right of detained person to writ—Place of detention—Practice—Exhibition of order—Defence (General) Regulations, 1939, *reg.* 18*B* (1.), (8.).

By the Defence (General) Regulations, 1939, reg. 18B, para. (1.): "If the Secretary of State has reasonable cause to believe any "person to be of hostile origin or associations, or to have been "recently concerned in acts prejudicial to the public safety or "the defence of the realm, or in the preparation or instigation of "such acts, and that by reason thereof it is necessary to exercise "control over him, he may make an order against that person "directing that he be detained." By para. (8.): "Any person "detained in pursuance of this regulation shall be deemed to be "in lawful custody and shall be detained in such place as may "be authorized by the Secretary of State and in accordance with "instructions issued by him."

The Home Secretary, whose functions under para. (1.) of the regulation are executive and not quasi-judicial, is vested by para. (1.) with discretionary power, and the court will not inquire into the grounds on which he has formed his belief, nor require him to produce the information on which he has done so. If the information is of a confidential character, he has a right to refuse to produce it in the public interest.

Rex v. *Secretary of State for Home Affairs. Ex parte Lees* [1941] 1 K. B. 72 discussed.

Eshugbayi Eleko v. *Government of Nigeria* (*Officer Administering*) [1931] A. C. 662, and *Rex* v. *Brixton Prison* (*Governor*). *Ex parte Sarno* [1916] 2 K. B. 742 distinguished.

On an application for habeas corpus by a person detained under reg. 18B, the gaoler or other officer detaining the applicant must justify the detention by producing a valid order of the Home Secretary issued pursuant to the Order in Council. If he produces an order which on its face is valid and so issued, the onus of showing that the order is invalid then rests on the applicant who does not discharge that onus merely by evidence that he has no knowledge of any reasons for the Home Secretary's belief, or by denying that there are, or can be, any reasons for it. Unless the bona fides of the Home Secretary be attacked, no affidavit by him is necessary.

Para. (8,) of the regulation does not take away the right of a detained person to apply for a writ of habeas corpus. The object of the paragraph is to provide that once an order of detention is made the person named in the order may be kept in custody anywhere and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment.

Where a person who is in custody and applies for a writ of habeas corpus does not inform the court of the order or warrant under which he is detained and the court grants an order nisi or summons to show cause, the person who has the custody of the prisoner must make an affidavit exhibiting the order or warrant under which he detains him.

A mistake on the part of the advisory committee, to whom the person detained makes objections against the detention order under para. (3.) of reg. 18B, in failing to give the person detained, pursuant to para. (5.) of the regulation, the correct reasons for his detention, does not invalidate an order for detention which was originally good or confer on the person detained a right to be released.

Appeal from an order of a Divisional Court refusing an application for a writ of habeas corpus.

On May 22, 1940, Sir John Anderson, then Home Secretary, made the following order for the detention of the appellant: "Whereas I have reasonable cause to believe Ben. Greene, "of The Hall Cottage, Berkhamsted, to be a person of hostile "associations and that by reason thereof it is necessary to "exercise control over him, Now, therefore, I, in pursuance of "the power conferred on me by reg. 18B of the Defence "(General) Regulations, 1939, hereby make the following "order: I direct that the above-mentioned Ben. Greene be "detained." On May 24 the appellant was detained in Brixton prison under the order of May 22 and he continued to be detained under that order, and afterwards by the order and direction of Mr. Herbert Morrison, the succeeding Home Secretary. A copy of Sir John Anderson's order was stated to have been given to the appellant, but he was incorrectly informed by the advisory committee, to whom he made objections against the order under para. (3.) of reg. 18B, that the ground on which he had been detained was that he had been "recently concerned in acts prejudicial to the public safety "and the defence of the realm, and in the preparation of such "acts." On March 26, the appellant applied ex parte to the Divisional Court for a writ of habeas corpus. In support of his application he swore an affidavit in which he denied that he was or had been at any time of hostile associations.

On April 22, in reply to the appellant's affidavit, Sir John Anderson swore an affidavit, in which he stated: "(3.) Before "I made the said order I received reports and information "from persons in responsible positions who are experienced "in investigating matters of this kind and whose duty it is "to make such investigations and to report the same to me "confidentially. I carefully studied the reports and con-"sidered the information and I came to the conclusion that "there was clear cause to believe, and I did in fact believe, "that Benjamin Greene was a person of hostile associations "and that by reason thereof it was necessary to exercise "control over him. (4.) A copy of the detention order was "sent by me to the advisory committee appointed under "reg. 18B of the Defence (General) Regulations, 1939, on "May 31, 1940. I am unable to say how the error occurred ". . . . in the statement of my reasons for making the order. ". . . . I submit that the error cannot have prejudiced Mr. "Greene, as he had a copy of the detention order and . . . . "he took no exception before the advisory committee to the "terms of the document. The advisory committee duly "reported to me. After again considering all the information "about the case, including the committee's report, I was "confirmed in my belief that Mr. Greene was a person of "hostile associations and that by reason thereof it was neces-"sary to exercise control over him." An affidavit was also sworn by the respondent, Mr. Morrison, in the following terms: "I have read a copy of the affidavit of Sir John "Anderson . . . . and I desire only to add that I have satisfied "myself that the said Benjamin Greene was and is a person "of hostile associations, and that by reason thereof it is "necessary to exercise control over him." On April 24 the appellant swore a further affidavit in answer to those sworn by Sir John Anderson and Mr. Morrison. In it he stated: "I deny that there is a clear cause to believe, or that the said "Sir John Anderson does in fact believe that I am a person of "such hostile associations that it is necessary to exercise "control over me. The said Sir John Anderson gives no "information to the court of the names of the 'persons in "'responsible positions' and I say this is not evidence that "this honourable court can accept. I crave that this honourable court will insist on its right to have before it the "evidence the said Sir John Anderson purported to act upon. "With reference to para. 4 of the said affidavit I deny that "the error therein referred to has not prejudiced me. . . . . "The procedure before the advisory committee was such that "I had no means of giving any explanations of the alleged "facts upon which any reasonable grounds of belief could be "based . . . . At no time was I given information as to which "particular activities or associations were relied upon to "constitute the said grounds [of detention]. I say, therefore, "that even after the hearing before the advisory committee "the Secretary of State had not, and could not have had, "reasonable grounds to believe anything which warranted "my continued detention. I have read what purports to be "a copy of the affidavit of Mr. Herbert Morrison . . . . It is "untrue to say that he has satisfied himself that I am a person "of hostile associations. My original detention and its "continuance have every appearance of being due to political "animosities, and are in the nature of political persecution." The appellant's application was adjourned for notice to be given to the Home Secretary and on May 2, 1941, the Divisional Court refused the application. The appellant appealed.

J. W. Williamson for appellant. The order of detention was bad, because the Home Secretary had in fact no reasonable, nor any, cause to believe that the appellant was a person of hostile associations. The vital words of reg. 18B are: "If the "Secretary of State has reasonable cause to believe." They create a condition precedent to a lawful detention; the onus is on the executive to prove that the detention is lawful; and the court must have some evidence before it to that effect. It was held in *Bushell's* case (1) that the cause of the imprisonment ought by the retorn to the writ of habeas corpus to appear as specifically and certainly to the judges of the retorn as it did appear to the court or person authorized to commit, else the retorn is insufficient. In *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (1), it was said that the court has power to inquire into the sufficiency of the affidavits filed by and on behalf of the Home Secretary, and it is the duty of the court to inquire, the extent of the inquiry being always a matter for the court. It is true that in *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (1), it was also held that the court will not act as a court of appeal from the discretion of the Home Secretary, and that in *Rex* v. *Halliday* (2) a similar statement was made, but no question of the discretion of the Home Secretary to detain a person arises until the condition precedent is fulfilled and it is shown that he has reasonable cause to believe and does believe one or more of the matters set out in para. (I.) of the regulation. It is always the duty of the court to be satisfied that the executive have acted within the limits of law. "In accordance "with British jurisprudence no member of the executive can "interfere with the liberty or property of a British subject "except on the condition that he can support the legality of "his action before a court of justice. And it is the tradition "of British justice that judges should not shrink from deciding "such issues in the face of the executive": per Lord Atkin in *Eshugbayi Eleko* v. *Government of Nigeria* (*Officer Administering*) (3). To justify his action, the Home Secretary has put in certain affidavits but those affidavits are inadmissible in that they do not disclose the sources of his belief: see R. S. C., Order XXXVIII., r. 3. Applying to the affidavits of the Home Secretary the language of Vaughan C.J. in *Bushell's* case (4), "The court hath no knowledge whether" the information before the Home Secretary "was full and manifest, "or doubtful, lame, and dark, or indeed evidence at all material "to the issue, because it is not retorned what evidence in "particular, and as it was delivered, was given. For it is not "possible to judge of that rightly which is not exposed to a

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(1) (1671) Vaughan 135, 137.

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(1) [1941] 1 K. B. 72.
(2) [1917] A. C. 260.
(3) [1931] A. C. 662, 670.
(4) Vaughan, 135, 137.

"man's judgment." Further, the appellant was prejudiced by the discrepancy between the terms of the order for his detention and the reasons for his detention given to him by the advisory committee. The whole of reg. 18B is to be taken as a code, and if that code is invalidated in one particular the detention is rendered invalid, even although the order was originally valid. If para. (8.) of reg. 18B is capable of being used by the executive as an estoppel of a plea for habeas corpus, it is ultra vires and void : see observations of Low J. in *Rex* v. *Governor of Brixton Prison. Ex parte Sarno* (1).

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. In considering habeas corpus proceedings the court does not sit as a court of appeal to investigate the merits which led to the incarceration. "On the motion for a habeas "corpus, there must be an affidavit from the party applying ; "but the return, if it discloses a sufficient answer, puts an end "to the case ; and I think the production of a good warrant is a "sufficient answer": per Lord Denman C.J. in *Ex parte Sheriff of Middlesex* (2). In *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)* (3) the executive power was limited by conditions precedent, and Lord Atkin merely intended to say that, where such conditions precedent were not satisfied, the court could inquire into the matter. As was said by Humphreys J. in *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (4), "No tribunal for investigating the question "whether circumstances of suspicion exist, warranting some "restraint, can be imagined less appropriate than a court of "law." That is a responsibility which must be placed on the shoulders of the executive answerable to Parliament. For the court to hear evidence and decide whether the Home Secretary had "reasonable cause to believe" would in effect be to transfer the responsibility for the administration of the regulation to the court. The Home Secretary is under no duty to reveal to the court the whole or any part of the information on which he bases his belief. In fact, in the

(1) [1916] 2 K. B. 742, 752.

(2) (1840) 11 Ad. & Ell. 273, 291, 292.

(3) [1931] A. C. 662.

(4) [1941] 1 K. B. 72, 79.

public interest he would refuse to disclose the sources of confidential information, and the court would uphold his refusal. The regulation confers on the Home Secretary a discretionary executive power the exercise of which will not be reviewed by the court. The discrepancy complained of by the appellant does not invalidate the detention or confer a right to release. The legality of the detention depends on the original order. In fact the appellant had not been prejudiced, because he received a copy of the original order.

Williamson replied.

The court dismissed the appeal, but took time to put its reasons in writing.

1941. July 30. The following judgments were read.

Scott L.J. This is an appeal from a decision of a Divisional Court of the King's Bench Division, consisting of Humphreys, Singleton and Tucker JJ., by which that court refused to order the release of a British subject whom the Home Secretary had purported, on May 24, 1940, to detain under the power conferred on him by reg. 18B of the Defence (General) Regulations, 1939. The application was made to the Divisional Court in accordance with Order LIX. of the Rules of the Supreme Court, which somewhat simplifies the old procedure for obtaining the prerogative writ of habeas corpus ad subjiciendum, but has left the law governing the rights of the subject and the jurisdiction and duties of the High Court unaffected. The question still is, as it always was, whether the subject is lawfully detained. If he is, the writ cannot issue. If he is not, it must issue. The right to release under Order LIX. is governed by the same principle. It is unnecessary in the present appeal to consider that fundamental rule of law. It is well understood and its principles are well summarized and noted in the part of the article on Crown Practice relating to habeas corpus in Halsbury's Laws of England, Hailsham ed., vol. ix.

The main, and I think the real, question in the appeal is whether the appellant was lawfully detained. The case for the appellant was clearly and forcibly argued before us by Mr. Williamson, but the court was unanimous in the opinion that the appeal must be dismissed. To prevent doubts arising in the public mind if we reserved our decision on a matter so generally and urgently important both to the liberty of the subject and to the discretion of the executive in the prosecution of the war, we announced the dismissal of the appeal forthwith, but took time to put our reasons in writing. [His Lordship read the Home Secretary's order and paras. (1.) and (8.) of reg. 18B.] The chief issue in the appeal turns on the question of the jurisdiction of the Home Secretary, and that in the main depends on whether he had "reasonable cause "to believe" the appellant "to be of hostile associations," for it is contended that the existence of such reasonable cause is a condition precedent to his jurisdiction, and that the facts constituting the reasonable cause are for the court to find and appraise, and not for the Home Secretary. That contention must depend primarily on the proper interpretation of para. (1.) and is a question of law. For reasons which I will state later there can seldom be any extensive controversy of fact on it, and in the present case I do not think there is room for any.

The appellant has in his affidavit himself exhibited the order and admitted that he was detained under it. If the Home Secretary had jurisdiction to make the order, the appellant was lawfully detained, and under the old procedure the return of that order to the writ would have been at least prima facie justification for the arrest. Under Order LIX. the same result must follow. The arguments on behalf of the appellant were (1.) that para. (1.), on its true construction, makes the existence of facts constituting "reasonable cause" a condition precedent to the jurisdiction; (2.) that the Home Secretary had not such reasonable cause; (3.) that the court has a duty to inquire into the facts and satisfy itself on that issue; (4.) that the onus of proof is on the Home Secretary; (5.) that he has not proved his case; (6.) that the provision in para. (8.) that "any person detained in pursuance of this regulation shall be "deemed to be in lawful custody" means "in lawful pursuance" and that if it does not mean that it is ultra vires. There were certain other contentions advanced, but it is convenient to postpone them till after consideration of the main question.

The only point of difficulty—and it is a real difficulty—is to decide to what extent the regulation leaves the ground for the Home Secretary's decision to his discretion. In construing the regulation I think it important to keep certain matters in mind. In the first place, Parliament by the Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 62), has delegated an extraordinarily wide degree of legislative power to His Majesty in Council. By s. 1, sub-s. 1: "Subject to the provisions of this "section, His Majesty may by Order in Council make such "regulations (in this Act referred to as 'Defence Regulations') "as appear to him to be necessary or expedient for securing the "public safety, the defence of the realm, the maintenance of "public order and the efficient prosecution of any war in which "His Majesty may be engaged, and for maintaining supplies "and services essential to the life of the community." By sub-s. 3: "Defence Regulations may provide for empowering "such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and bye-laws for "any of the purposes for which such regulations are authorized "by this Act to be made, and may contain such incidental and "supplementary provisions as appear to His Majesty in "Council to be necessary or expedient for the purposes of the "regulations." Sub-s. 4 provides that a Defence Regulation "shall have effect notwithstanding anything inconsistent "therewith contained in any enactment other than this "Act . . . ."

The King in Council is, under our constitution, an executive rather than a legislative authority, for it is in practice the Cabinet itself, represented by certain members in attendance on the King, and it is to that authority, representing the executive government, that Parliament did, for the duration of the emergency, entrust an almost plenary discretion. When that authority in turn delegated to a particular member of itself, namely, a Secretary of State, power to make orders within the scope of the regulation, for example, for the various war purposes specified in reg. 18B, I should presume, in the absence of clear words to the contrary, a similar intention to trust to his discretion.

The history of the legislation is of help. In the last war reg. 14B was the precursor of the present reg. 18B. It was made under the Defence of the Realm (Consolidation) Act, 1914, s. 1, sub-s. 1. By that regulation the Home Secretary was only to act on the recommendation of a competent naval or military authority or of one of the advisory committees thereafter mentioned, but on receipt of such a recommendation, if it appeared to him that "for securing the public safety or "the defence of the realm it was expedient in view of the "hostile origin or associations of any person" to detain that person, he was given complete discretionary power by order to do so. One such order for detention was considered by the House of Lords in *Rex* v. *Halliday* (1), and the general principles there enunciated appear to me equally applicable in considering the interpretation of the present reg. 18B, subject always to due weight being given to the words of its opening protasis, "If the Secretary of State has reasonable "cause to believe." I recognize that those opening words do grammatically constitute a condition of some kind to be fulfilled before the Secretary of State can exercise his powers, but everything depends on its true meaning in its context, and that problem of construction cannot be solved without due regard to the general purport of the regulation as a whole. To that aspect what was said in *Rex* v. *Halliday* (1) has great materiality. It had been argued there that reg. 14B on its natural interpretation interfered with the liberty of the subject in so unconstitutional a manner as to make it necessary to put a limiting construction on its language. The House by a majority of four to one (Lord Shaw dissenting) held to the contrary. Lord Finlay L.C. said (2): "It appears to me to be "a sufficient answer to this argument that it may be necessary "in a time of great public danger to entrust great powers to "His Majesty in Council, and that Parliament may do so "feeling certain that such powers will be reasonably exercised."

(1) [1917] A. C. 260.

(2) Ibid. 268.

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Lord Dunedin said (1): "That preventive measures in the "shape of internment of persons likely to assist the enemy may "be necessary under the circumstances of a war like the present "is really an obvious consideration. Parliament has in my "judgment, in order to secure this and kindred objects, risked "the chance of abuse which will always be theoretically present "when absolute powers in general terms are delegated to an "executive body; and has thought the restriction of the "powers to the period of the duration of the war to be a "sufficient safeguard." Lord Atkinson dealt with the necessity of "preventive justice" in times of emergency, and called attention to the precautions contained in the regulation to prevent error or abuse (2). One was the system of strong advisory committees (which is again provided for in the present regulation by paras. (4.) and (5.)). Lord Wrenbury pointed out that the powers conferred upon His Majesty in Council were to pass not by-laws, but important legislation, and that the regulations took effect as if they were contained in the statute (3). He dealt with the express argument that the regulation was ultra vires the statute, an argument which has been half-heartedly advanced in the present case with regard to the first half of para. (8.). Although it is not now pressed strongly on us, so much that has been urged verges on that argument that I think it useful to quote Lord Wrenbury's words: "The application before your Lordships is "for a writ of habeas corpus, and the ground advanced is that "reg. 14B is ultra vires. If that were established he [the "applicant] would be discharged. The Habeas Corpus Act "is in full force; but this statute and the regulations made "under it have provided machinery for achieving in a way "other than that of suspending the Habeas Corpus Act the "preventive detention of persons who are not alleged to "have committed any offence, but whom it is desired to "prevent from committing one. The regulation is, in my "judgment, one within the authority given by the Act."

With that preface to clear the air round the problem of

(1) [1917] A. C. 271.
(2) Ibid. 273.
(3) Ibid. 307, 308.

interpretation, I come to the crucial point. What is the meaning fairly attributable to the opening language of para. (1.)? Who is to decide the issue of reasonable cause, the Secretary of State, or a court? If a court, how could the question itself be brought before the court? By certiorari to quash the order of the Secretary of State, or mandamus to hear and determine according to law? Obviously, neither. It cannot be by habeas corpus, because the High Court does not sit as a court of appeal in such proceedings. If it be said that these are technical reasons I reply that the answer is equally plain on the broad grounds of national interest stated in *Rex* v. *Halliday* (1), which we ought to presume guided the present delegated legislation of His Majesty in Council. The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action, by an executive minister of the Crown who occupies a position of utmost confidence, who has at his disposal much secret information which ought not to be made public—above all, during a war—who is under a duty to keep that information and its sources secret, and, finally, who cannot be compelled in any court to divulge what he considers ought not in the national interest to be divulged. All the King's courts recognize that inhibition and enforce it. The arguments which have been advanced in some of the cases rest expressly or impliedly on a contention that the Home Secretary in making an order is exercising a quasi-judicial function, as if he had to hear both sides before coming to a decision on the preliminary issue. That contention is in my view wrong. His capacity is purely executive, as it is when deciding whether or not to deport an alien, as was pointed out by Lord Reading C.J. in *Rex* v. *Inspector of Leman Street Police Station. Ex parte Venicoff* (2), and I adopt his words: "The Home Secretary is not a judicial officer for this purpose, "but an executive officer bound to act for the public good, "and it is left to his judgment whether upon the facts before "him it is desirable that he should make a deportation order. "The responsibility is his."

(1) [1917] A. C. 260.

(2) [1920] 3 K. B. 72, 80.

Even if the issue could properly be brought before a court it would be futile to ask the court to decide it unless the material evidence could also be brought before it, and of that the impossibility seems to me self-evident. For these reasons I do not think that the crucial words "reasonable cause" can properly be construed as imposing an objective condition precedent of fact, on which a person detained would be entitled in any legal proceedings to challenge the grounds for the Secretary of State's honest belief, either by requiring disclosure of the confidential information which he had received in the course of his official duty, or by tendering evidence that there was in fact no reasonable cause. If the Secretary of State's information is confidential, its confidential character, in my opinion, necessitates logically the conclusion that the regulation makes him the final judge of the reasonableness of the cause on which he takes action—in short, that the condition is subjective, not objective.

I agree that this meaning would have been made more obvious if the words "in his opinion" had preceded the words "reasonable cause," but that difference of language is not, in my opinion, sufficient to refute the conclusion I have expressed. In addition there are certain further reasons which support that conclusion. (1.) The comparison with 14B of the 1914 regulations is the first. The draughtsman of the present regulation obviously had the earlier one in mind. It may well be that the omission of the old requirement of a recommendation by a competent naval or military authority or an advisory committee influenced the legislative decision to provide some other assurance to the public in its place. If so, the words "reasonable cause" may very properly have been chosen in the sure belief (as Lord Finlay said in *Rex* v. *Halliday* (1)) that the Secretary of State would only exercise his powers after satisfying himself that he has such reasonable cause. (2.) Reg. 18B preserves all the protective system of advisory committees, but improves it materially as a protection for the detained person: paras. (3.) and (5.). (3.) Para. (6.) places on the Secretary of State a significant new duty, namely, both

(1) [1917] A. C. 260.

to make a general report every month to Parliament and also to state "the number of cases, if any, in which he has declined "to follow the advice of an advisory committee." (4.) Para. (4.) grants to every detained person an express new right, for which he is to be given "the earliest practicable opportunity," to make a direct appeal to the Secretary of State. If His Majesty in Council intended to confer a plenary discretion on the Secretary of State, could he have manifested that intention more clearly? It is essential to the interpretation of para. (1.) to keep in mind its setting in the regulation as a whole, and, if it is so construed, the four considerations I have mentioned suffice in my mind to clear up any ambiguity left by its opening words and to establish the construction I put on the paragraph.

There is another possible interpretation of para. (1.), which is slightly different, but leads to the same conclusion. I assume for this interpretation that in one sense the objective existence of a "reasonable cause" is intended by the regulation to be a condition precedent to the jurisdiction of the Secretary of State. Even so, when he receives confidential information of a kind which compels his mind to the belief in question, that information must, in my opinion, necessarily constitute for him reasonable cause, and that must mean that the decision is left to him. If so, the condition is then ipso facto satisfied, provided always that he forms an honest judgment. On the affidavits of the two Home Secretaries in the present case it is beyond dispute that each in his own mind did so arrive at an honest belief. It follows that the condition was fulfilled and the detention was truly in lawful pursuance of the regulation, and it is unnecessary to consider whether para. (8.) gives artificial legality to a detention that was not regular.

Mr. Williamson, before us, relied on the passage in the judgment of the court (consisting of Humphreys, Oliver and Croom-Johnson JJ.) delivered by Humphreys J., which appears in the report of *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (1): "The next and only other point taken was "that the order is invalid because the Home Secretary never "had any reasonable cause to believe that the applicant was

(1) [1941] 1 K. B. 72, 78.

"a person to whom the regulation applied. Now the court "entertains no doubt that upon an application for a writ of "habeas corpus the court has power to inquire into the validity "of the order of detention, and for that purpose to ascertain "whether the Home Secretary had reasonable cause for the "belief expressed in the order." With the first half of the last sentence I entirely agree, but unless the subsequent approval of the whole judgment by the Court of Appeal compels us to treat it as binding authority I feel difficulty in accepting the second part in all its generality, because it may be read as inviting inquiry by the court into the evidence of reasonable cause. I cannot think that the Divisional Court intended such a pronouncement, for they accepted the qualification submitted by the Solicitor-General that no court can "have before it all the material upon which the belief of the "Home Secretary was based." The Solicitor-General, no doubt, had in mind the duty of a Minister of the Crown, under our English constitution, to keep to himself all confidential information. On it he cannot be cross-examined, and no court will ever think of asking him to divulge it. There is a further point about *Ex parte Lees* (1). When the Court of Appeal heard that appeal the applicant had already been released, and the court only heard the appeal to deal with the question of costs. If the court intended to say anything different to what I have now said (which I hardly think) I confess to some little doubt as to the binding authority of a judicial pronouncement by the Court of Appeal of its reasons for dismissing an appeal by a prisoner in habeas corpus proceedings, when at the time of the judgment the prisoner has already been set free. At any rate, I feel sufficient doubt as to the intended scope of the passage to which I have referred, as not to feel precluded by it from the free expression of my own view.

It was also contended for the appellant before us that what I am saying is contrary to what was said by Lord Atkin in delivering the advice of the Privy Council in *Eshugbayi Eleko* v. *Government of Nigeria* (*Officer Administering*) (2), in approval

(1) [1941] 1 K. B. 72, 78.

(2) [1931] A. C. 662, 671.

of what Low J. had said in *Rex* v. *Governor of Brixton Prison. Ex parte Sarno* (1). "The question whether the applicant "was an alien or not did not arise. He admittedly was; "but their Lordships agree with the opinion of Low J. that, "had the matter been in dispute, the court would have had "to decide it." I cannot see that there was any issue before the Privy Council in that case which makes that passage, or the decision itself, relevant to the interpretation of reg. 18B, so as to affect the jurisdiction of the Secretary of State under it. In the *Nigerian* case (2) the relevant ordinance conferred on the governor jurisdiction to deport if, and only if, certain antecedent propositions were established or admitted as extrinsic facts: (1.) the person to be deported must have been a native chief; (2.) he must have been deposed; and even then he could not be deported unless (3.) there was a native custom requiring him to leave the area where he had been chief. It was held that the ordinance in question made each fact a condition precedent to any exercise by the governor of the power to deport and that each condition had to be established either by admission or proof before a court. On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise. The decision of the Privy Council that each condition created a justiciable issue, to be solved before the governor's jurisdiction could arise, therefore, does not touch the present case. Nor does the view expressed by Low J. in the *Brixton Prison* case (2), for the power to deport an alien necessarily involves a condition precedent to its exercise that the person should in fact be an alien, and the issue "alien or not alien" cannot be within the jurisdiction of the Home Secretary to decide unless the statute has by clear words conferred it on him, which the Aliens Acts do not. In my respectful opinion, the Privy Council were not intending to say anything that bears on the questions we have to decide.

We were supplied by the parties with transcripts of judgments in certain recent cases. I will refer to them shortly, taking them in their order of date. The first, a habeas corpus case,

(1) [1916] 2 K. B. 742, 752.

(2) Ibid. 742.

Rex v. *Secretary of State for Home Affairs. Ex parte Budd* (1), was a decision of a Divisional Court consisting of Humphreys, Singleton and Tucker JJ. In that case the order was made under para. (1A) of reg. 18B, on the ground of membership of an organization within the mischief aimed at by that paragraph. It purported to deal with a large number of persons, and was kept in the Home Office, three short documents being drawn up for service on the prisoner, and otherwise. These documents ought to have been exact copies of at least that part of the omnibus order which concerned Budd. In truth, they were not copies at all, and purported to record an essentially different order by the Home Secretary, namely, under para. (1.), on the ground of hostile associations, and not on the ground of membership of such an organization as is dealt with by para. (1A). The court released the applicant, chiefly, I think, on the ground of that difference, holding, in effect, that it was an essential requirement of the regulation that the prisoner should be informed truly of the ground of the order made by the Home Secretary. It is not necessary for the present appeal to consider the other reasons discussed in that case; but it must not be assumed that I agree with all that was said.

The next case was *Liversidge* v. *Anderson and Morrison* (2), which was an action by a detained person for a declaration against Sir John Anderson, who as Home Secretary had ordered his detention, and Mr. Morrison, who as the next Home Secretary did not release him. The defence relied on the order of detention. The plaintiff applied for particulars "of "paragraph 3 of the defence (*a*) of the grounds upon which the "first defendant had reason to believe the plaintiff to be a "person of hostile associations, and (*b*) of the grounds on which "the said defendant had reasonable cause to believe that by "reason of such associations it was necessary to exercise control "over the plaintiff." The master, and Tucker J. both refused them. So also did the Court of Appeal, consisting of MacKinnon, Luxmoore and du Parcq L.JJ. They held that the plaintiff was not entitled to such particulars unless the onus of proof was on the defendants, and they were clear that

(1) *The Times*, May 28, 1941.

(2) [1941] W. N. 189.

it was not. That decision is indirectly helpful in the present case, because if it had been held that the onus of proof had rested on the Home Secretary to establish the grounds of his belief in the plaintiff's hostile associations or in the necessity of exercising control over him, it would have been opposed to the views I have expressed in this judgment.

Next was *Stuart* v. *Anderson and Morrison* (1), which was an action for false imprisonment tried before Tucker J. without a jury. The plaintiff put forward two contentions, but I need only refer to the second, namely, that the order of detention was bad because the Home Secretary had no reasonable cause for his belief. A regular order of detention was produced, which it was admitted by the plaintiff was signed by the Home Secretary, although the copy served on him had been signed by the Permanent Secretary of the Home Office. The Attorney-General elected not to put the Home Secretary in the box, in the learned judge's opinion rightly, and I agree with him. Tucker J. held that the production of an order of detention, regular on its face, shifts the onus on to the plaintiff (assuming that it ever rested on the defendant, which is not my view) and he made some forcible observations (2): "I do not desire to say anything more about the facts of the "case, and I should have desired not to mention them at all, "because I think that it is very undesirable in cases of this "kind, where the court can of necessity know only part of the "facts, that it should go into the merits at all. I would not "have done so had it not been necessary to deal with the "submissions of counsel for the plaintiff. One of the difficulties "of seeking to invoke the jurisdiction of this court in these "cases is that, of necessity, the court knows only a fraction "of the case. This arises from the attitude taken up by the "Home Secretary in these cases, which the Court of Appeal "has held is the proper attitude—namely, his refusal to put "before the court the material upon which he came to his "conclusion in the matters." He gave judgment for the defendants, and I find myself in agreement with the above

(1) [1941] 2 All E. R. 665. (2) Ibid. 675.

passage, and, indeed, with most of what he said, in a careful, though extempore, judgment.

The last case cited to us was the second *Budd* case (1). Budd had been released from detention and had been re-arrested. He again took habeas corpus proceedings, but the Divisional Court, consisting of Viscount Caldecote C.J. and Macnaghten and Stable JJ., the last named dissenting, refused to release him. As that case may come before us on appeal I think it better not to discuss it, beyond saying that the Lord Chief Justice relied on a passage from the judgment of MacKinnon L.J. in the *Lees* case (2), and that I disagree with the conclusion of Stable J.

An entirely separate point, and one of public importance, was made on the appellant's behalf, both before us and below, in connection with an appeal by him to the advisory committee pursuant to para. (3.) of the regulation. Para. (5.) puts on the chairman of the committee "a duty to inform the objector "of the grounds on which the order had been made against "him and to furnish him with such particulars as are, in the "opinion of the chairman, sufficient to enable him to present "his case." Unfortunately, the notice from the chairman, handed to the appellant to inform him of the grounds on which the order had been made against him, omitted the belief of the appellant's "hostile associations" on which the order had in fact been founded, and substituted as grounds for the order, a belief of the Secretary of State that the appellant had been "recently concerned in acts prejudicial to the public "safety or the defence of the realm, and in the preparation and "instigation of such acts." These statements follow the language of the latter part of para. (1.), but the first paragraph of the "particulars" given under para. (5.) related solely to the ground for detention covered by para. (1A), namely, membership of an organization under foreign influence or controlled by persons having associations or sympathies with enemy governments. It was the case that paras. (3.), (4.) and (5.) properly come under the general heading of "hostile associations," but the omission of any reference to hostile associations from the general statement at the head of the notice, coupled with the misrepresentation contained in para. (I.) of the particulars, was at least likely to confuse the appellant and handicap him in his appeal. It was contended that this discrepancy between the notice from the chairman of the advisory committee and the order in fact made by the Home Secretary made the detention illegal ab initio, or, alternatively, from the date of the notice. I do not think it can have either effect. The appellant appeared before the committee, and it is not suggested that he there complained of the discrepancy. He possessed document "B.G.I," originally served on him, and knew that "hostile associations" was the grounds on which it was made, as was found as a fact by the Divisional Court. He also saw that most of the particulars, if not all, fell within that general allegation. As found below, he received the notice five days before he appeared before the committee, and Humphreys J. held on the affidavit evidence, and after hearing the appellant in person, that he was not in fact prejudiced by the mistake. As a matter of law I cannot see anything in the regulation which would justify the conclusion that such a mistake by the advisory committee either invalidates an originally good order or confers a right to release.

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(1) *Rex* v. *Home Secretary. Ex parte Budd* [1941] 2 All E. R. 749.
(2) [1941] 1 K. B. 72.

A much worse mistake was alleged by the appellant, namely, that he had not been informed of his right to make representations direct to the Secretary of State under the regulation. The evidence was dealt with in the judgment below in detail, and the court held that the allegation was unfounded. It is, therefore, unnecessary to consider what the effect would be of such a default if proved. None the less I attach great importance, and I am sure the Home Secretary does also, to the most careful observance of every precaution provided by the regulation for the protection of any person detained under reg. 18B. The liberty of the subject is only one degree less important than the safety of the Nation. Unfortunately, there have now been several preventive detention cases before the courts in which errors of procedure have been committed, and in one case, certainly, the first *Budd* case (1), a discrepancy occurred between the supposed "copy" of the Home Secretary's order served on the person detained and the original order which amounted to more than an error of procedure and led the Divisional Court to release the applicant. The subject's right of habeas corpus, as it is called, has not, as some still wrongly suppose, been abolished. It remains untouched in this war. It remained untouched in the last war, as the House of Lords pointed out in *Rex* v. *Halliday* (2), but the safety of the State in war calls for stringent preventive steps to avoid grave risks. Regulation 18B is essentially such a provision and it ought to be generally understood that it is not punitive but purely preventive in its object. If a person is unlawfully detained he is still entitled to his release by the King's Bench, but, conversely, it is essential that the executive should have wide discretionary powers to forestall dangers, and in no one of the cases which have come before the courts, so far as I can see, has there been the faintest ground for imagining that the public cannot implicitly trust the King's Minister holding the office of Secretary of State for Home Affairs to do his very best honestly to carry out the onerous duties imposed on him by reg. 18B.

There is one general conclusion to which consideration of the present case had led me. I can see no legal need for the Home Secretary making any affidavit. The onus of proof is not on him. In addition, there is a definite reason why unnecessary affidavits should not be made by him in habeas corpus proceedings under Order LIX. of the Rules of the Supreme Court. The ordinary procedural rules about hearsay statements and the right of the other side to cross-examine are applicable, and both rules make affidavits by him almost futile. If his bona fides were attacked, a different position might arise, but in the ordinary case a letter from the Home Office addressed to the court and identifying the order made should be a sufficient substitute for the gaoler's return to the writ under the old practice. I express no opinion on the question whether it would be more convenient

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(1) *The Times*, May 28, 1941.

(2) [1917] A. C. 260.

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for the gaoler to make an affidavit exhibiting the original order.

In spite of Mr. Williamson's admirable argument, the appeal must be dismissed with costs.

MACKINNON L.J. I agree that this appeal fails. I had begun to write at some length my reasons for that conclusion, when I had the opportunity of reading the judgment which Goddard L.J. is about to deliver. Finding that he had expressed, more clearly, what I had been writing, I thought it was undesirable for me to complete my disquisition, and that it would suffice for me to say that I agreed with all that he is about to say. A subsequent perusal of the judgment of Scott L.J. has confirmed my belief that it is unnecessary for me to set forth my reasons at length. I will, therefore, only add a few words.

On an application for habeas corpus the gaoler, or other person detaining the applicant, must justify the detention. In an ordinary case that is done by producing a legal order directing it. In this case that must be a valid order of the Home Secretary, issued pursuant to the Order in Council. The production of such an order in proper form would justify the detention, and prima facie be conclusive. The onus of showing that the order is invalid rests on the applicant. No evidence on the part of the gaoler, or of the Home Secretary, to establish the validity of the order (except proof of its signature if that is disputed) is necessary, unless the applicant has adduced evidence of its invalidity sufficient to discharge and shift the onus of proof which rests primarily on him.

The power of the Home Secretary to issue a valid order depends on the fulfilment of a condition. The nature of that condition is very material. It is not the existence of an objective fact, for example, that the person concerned is an alien. It is the existence of a subjective state of mind in the Home Secretary, that is, that he has reasonable grounds for believing certain facts to exist, and, by implication, that he honestly entertains that belief. If an order asserting the existence of that state of mind and belief, in valid form, has been made, the onus on the applicant of disproving its existence is obviously much more difficult than would be the disproof of an objective fact, for example, that the man is an alien. Evidence of the applicant that he does not know that there are any reasons for the Home Secretary's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the Home Secretary to explain and justify the assertion of his order. In the present case the appellant does rather more than make those general assertions or denials, and an affidavit in reply has been filed by the Home Secretary. As the evidence stands, the appellant has failed to satisfy me that the facts justifying the belief of the Home Secretary do not exist, or that the Home Secretary does not reasonably and honestly believe them. He, therefore, fails to show any invalidity in the order for his detention, and his application for a writ of habeas corpus must fail.

Finally, I should like to pay my tribute to the merits and the manner of Mr. Williamson's argument for the appellant.

Goddard L.J. Mr. Williamson, in this appeal, submitted several grounds for reversing the decision of the King's Bench Division and for supporting his contention that the appellant was entitled to an order for discharge, which under modern practice can now be granted after argument on an order nisi or summons for a writ of habeas corpus. With all these grounds it will be necessary to deal, but his main contention, to which most of the argument was addressed, was that it was for the Secretary of State to prove that he had reasonable grounds for believing that the appellant was a person of hostile associations and that it was necessary to exercise control over him. It was said that the court could not hold that there was proof of any reasonable ground of belief unless at least some of the facts on which the Secretary of State formed his opinion were set out by him in his affidavit. Now it might be enough to say that in *Ex parte Lees* (1), this court, upholding the King's Bench Division, were satisfied with an affidavit from the Secretary of State precisely in the same form,

(1) [1941] 1 K. B. 72.

so far as this matter is concerned, as that sworn by him in the present proceedings, but, in deference to Mr. Williamson's argument, and because it is desirable that there should be no misunderstanding about the reason why an affidavit which does not set out the grounds may be sufficient, and also because of certain expressions of opinion and doubts in recent judgments on this class of application, I propose to state my reasons fully.

We were also invited by the Attorney-General to say whether it was, indeed, necessary for the Secretary of State to have made an affidavit at all, and, as this case may form a guide for future proceedings, I think it is right that this court should decide that point. For, if it were not necessary for the Secretary of State to have made an affidavit, it follows that that to which he has sworn cannot be insufficient. This latter question was not raised in *Ex parte Lees* (1). The court then emphasized that it was not their function to act as a court of appeal from the exercise of the Secretary of State's discretion, but they did rely on the affidavit, as did the King's Bench Division, and, seeing no ground for disbelieving it, refused the application for a writ. It is said that the court has no material on which it can come to a decision whether the Secretary of State acted on reasonable grounds, and this raises the question whether the onus of proving that there were such grounds lies on the Secretary of State, or whether it is for the appellant to prove that there were not. I shall deal with this point when I come to consider whether it was necessary for the Secretary of State to have made an affidavit.

Assuming the necessity for an affidavit, I am of opinion that the Secretary of State cannot be required to set out the grounds of his belief, or to give the information which led him to the opinion that he formed. It is obvious that this information is confidential, and, in my opinion, the Secretary of State's affidavit in effect claims that it is. Moreover, the Attorney-General informed the court that the Secretary of State declined to disclose the information on which he acted as it would be contrary to the public interest so to do. It follows that, if the appellant sought to cross-examine the deponent, the court would be obliged to uphold the Home Secretary's objection to giving the sources or nature of his information. This result does not arise from the regulations. It is a rule of the common law. It must be assumed that both His Majesty in Council, by whom the regulations are made, and Parliament, who entrusted His Majesty with that power, and has the right to annul any regulation, knew of this rule, and, accordingly, realized that the Secretary of State could not be called on to give away his information or grounds of belief. It is a rule which may work hardship to anyone in litigation with the Crown. The privilege indeed extends to actions brought against persons who may have documents in their possession which belong to the Crown. In the recent case of *Duncan* v. *Cammell, Laird & Co., Ld.* (1) an action was brought against the builders of one of His Majesty's submarines alleging negligence, and the plaintiff sought discovery of some documents which the defendants held subject to the directions of the First Lord of the Admiralty. The First Lord directed the defendants not to disclose them, and made an affidavit claiming privilege for the documents which this court upheld without seeing them, holding that the claim was conclusive. Mr. Williamson went so far as to contend that the court could not look at the Home Secretary's affidavit because the grounds of information and belief were not stated, as is required by Order XXXVIII., r. 3, of the Rules of the Supreme Court. Apart from the Minister's privilege, I do not think that this rule applies to the affidavit in question. The fact to which the Secretary of State deposes is that he had reasonable grounds for his belief, that is to say, to his own state of mind, which is a fact within his own knowledge. He is not deposing to the facts which were told him, nor that he believed all that was told him. Nor does it appear to me to be right to say, as Stable J. appears to have thought, in *Ex parte Budd* (No. 2) (2), that, in the absence of this information, the court cannot decide whether the Secretary of State had reasonable grounds for his belief or not and that consequently

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(1) [1941] 1 K. B. 72.

(1) [1941] 1 K. B. 640. (2) [1941] 2 All E. R. 749.

the prisoner must be discharged. Suppose in an action an issue arose whether a Minister of the Crown had received certain information. If the Minister swore that he had, although he declined to say from whom he got it, or even what it was, the court would have to make up its mind whether it believed him or not. I see no reason whatever here for disbelieving the affidavits of Sir John Anderson and Mr. Morrison and, as I hope to show when dealing with the question whether it was necessary for those affidavits to be filed, the appellant's affidavits are no evidence to the contrary. It follows that, as in *Ex parte Lees* (1), the appellant is not entitled to an order on this ground alone.

I now consider, however, whether it was necessary for the Secretary of State to have made an affidavit in this case. If it were possible to say that under the regulation he had to act in a judicial capacity the matter would, I think, be clear. If a person committed by order of a court applies for a writ, and on a return, or in accordance with the modern practice by an affidavit showing cause, the gaoler produces an order of commitment regular on its face and showing that the prisoner was committed for matter within the authority of the court, the court to which application for the writ is made, not being a court of error or of appeal, cannot entertain the question whether the authority has been properly exercised: see the judgment of Patteson J. in *Stockdale* v. *Hansard* (2), and of Lord Denman C.J. in delivering the judgment of the court in *Ex parte Sheriff of Middlesex* (3). But there can, I think, be no doubt that the Secretary of State in making these orders acts wholly in an executive and not in a judicial capacity. Mr. Williamson, accordingly, relies on the advice of the Judicial Committee delivered by Lord Atkin in *Eshugbayi Eleko* v. *Government of Nigeria* (*Officer Administering*) (4). In my opinion, the passage relied on (5) does not mean that where the executive has detained a person under statutory authority (and the regulations have the force of statute)

(1) [1941] 1 K. B. 72.
(2) (1839) 9 Ad. & E. 1.
(3) 11 Ad. & E. 273.
(4) [1931] A. C. 662.
(5) Ibid. 670.

that person can, merely by saying "I do not know why I have "been detained," oblige the executive to prove that every condition necessary to the making of the order has been fulfilled. In my opinion, when once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for its making do not exist.

The matter can be tested, I think, by considering the former procedure, largely superseded by Crown Office Rules (now embodied in Order LIX.), which, while altering the practice, retain the substance of the old procedure. Formerly, on a suggestion, supported by affidavit, that a subject was unlawfully detained, the court issued the writ of habeas corpus. It was directed to the gaoler, or whoever had the actual custody of the applicant, and the court might, and frequently did, cause notice to be given to the person alleged to be responsible for the imprisonment. The writ directed the gaoler to have the body of the prisoner before the court, and directed him to return also the cause of the imprisonment. The gaoler would in the ordinary course return the warrant or order which committed the prisoner to his custody, and the court would then examine it. It is not without significance that in the first instance the return had not to be verified by affidavit, for until impeached it was to be regarded as true: *Ex parte Watson* (1). The prisoner was then allowed, if he could, to controvert the return, and this right is expressly preserved by s. 4 of the Habeas Corpus Act, 1816. By s. 3 the court is given power to inquire into the truth of the return by affidavit. In *Ex parte Sheriff of Middlesex* (2), Lord Denman, speaking of that section says: "On the motion for a habeas corpus there must "be an affidavit from the party applying, but the return, if it "discloses a sufficient answer, puts an end to the case, and I "think the production of a good warrant is a sufficient answer. "Seeing that, we cannot go into the question of contempt "on affidavit nor discuss the motives that may be alleged." There was no question in that case of the warrant of imprisonment being anything but good, and, in my opinion, all that

(1) (1839) 9 Ad. & E. 731. (2) 11 Ad. & E. 273.

the court can do under s. 3, where the justification in the return is a warrant or order, regular on its face and showing a good cause of commitment, is to inquire if in fact it is a true warrant, that is, if it is in truth the warrant of the committing authority, and if it is under that warrant that the prisoner is in fact detained. But this still leaves it open to the subject, under s. 4, to controvert the return, in which case the onus is on him. This, in my opinion, is what the Judicial Committee held the subject was entitled to do in the *Nigerian* case (1). The deportee had raised two contentions, among others, first, that he was not a native chief, and, secondly, that he had not been deposed, and he said that, accordingly, the governor had no power to deport him under the ordinance under which he had purported to act. The Supreme Court in Nigeria had held that they could not go behind the order, but the Judicial Committee decided that they were bound to inquire into the subject's contentions. Lord Atkin instances the analogy of a deportation order under the Aliens Act, and it seems to me that what he means is that a person ordered to be deported could raise the contention that he was not an alien and, therefore, the Secretary of State could not deport him. It does not mean that, if he is an alien, the court can inquire why the order was made. It is, I think, clear that it would be for the subject to prove that he was not an alien, and this is what I understand to have been the opinion both of Lord Atkinson and Lord Wrenbury in *Rex* v. *Halliday* (2).

That case arose in the last war under reg. 14B which, though in different terms from that which is now under consideration, conferred a power of internment on the Secretary of State. The actual point in the case was whether the regulation was ultra vires the Defence of the Realm Act. The prisoner was detained as a person of hostile origin, as it was admitted he was. In that case what was necessary to give the Secretary of State jurisdiction to make an order was that the competent military authority had recommended the expediency of detaining the particular person, but for the purpose of what the court has now to consider it is, I think, material to notice

(1) [1931] A. C. 662.

(2) [1917] A. C. 260.

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that Lord Atkinson said, in speaking of the order (1): "And "in view of that fact which is not disputed" (i.e. the hostile origin) "it sets out that the Secretary of State, being duly "recommended in the manner prescribed, makes an order that "the appellant shall be interned for the purpose of securing "the public safety and the defence of the realm. The order "thus sets out upon its face all the requirements necessary "for its validity if the regulation under which it purports "to be made is valid. On that assumption it shows upon its "face jurisdiction to make it." Observe, nothing is said as to any obligation of the Secretary of State to show that he had in fact been recommended to make the order, but I understand from this passage that, had the appellant been able to show that he was not of hostile origin or that no recommendation had been made, he would have succeeded. Then Lord Wrenbury says (2): "If his case were that he had neither "hostile origin nor associations he could have his writ of "habeas corpus on the ground that that was so, and if he "established the fact he would be discharged." That in terms puts the onus on the applicant, and I think the conclusion is that the applicant can controvert the return, and if he proves his case, and it is for him to prove it, he will be discharged.

In my opinion, neither the affidavits made by the present appellant are, nor were those in *Ex parte Lees* (3) anything like enough to controvert the return. I use the expression "the "return" as the affidavit of the Secretary of State is the modern equivalent of the return. The applicants do not show that the Secretary of State had no reasonable grounds for making the order by saying: "I do not know why the order "was made." It may be said that this is a hardship because the prisoner cannot know what reasons the Secretary of State had. It is for that very reason, I think, that the regulation has provided the safeguards of ensuring that the prisoner shall have the opportunity of putting his case before the advisory committee, and the even higher safeguard of requiring the Secretary of State to make a monthly return to Parliament

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(1) [1917] A. C. 274.
(2) Ibid. 308.
(3) [1941] 1 K. B. 72.

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of the action taken by him under the regulation, thus giving the legislature an opportunity of disapproving any particular order and thereby controlling the actions of the Minister.

Mr. Williamson, in his careful and learned argument, contended that *Bushell's* case (1), and, indeed, all the cases, showed that the onus was on the Secretary of State. I cannot agree. In *Bushell's* case (1) the return showed that the prisoner as a juryman had been committed for returning a verdict of acquittal contra plenam et manifestam evidentiam. The return, therefore, showed not only the fact that he was committed by a court of law but also the grounds on which the court had committed him and so the grounds could be looked at. It was held that those grounds were not sufficient in law. If in a return grounds are shown that are insufficient in law the discharge of the prisoner must be ordered. For the reasons which I have already given I think that *Rex* v. *Halliday* (2) is directly against Mr. Williamson's contention, and *Bushell's* case (1) does not, in my opinion, support it.

I am of opinion that where on the return an order or warrant which is valid on its face is produced it is for the prisoner to prove the facts necessary to controvert it, and in the present case this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit. It must depend on the ground on which the return is controverted. but where all that the prisoner says in effect is " I do not know "why I am interned. I deny that I have done anything wrong," that does not require an answer because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise.

Before dealing with the subsidiary points raised by Mr. Williamson, I will deal with the question whether para. (8.) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words "shall be deemed "to be in lawful custody" are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning or the reason for the paragraph. If the order has been irregularly made the prisoner is not detained in pursuance of, but despite, the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained a similar provision. It provided that an alien might be put on board a ship and detained in such manner as the Secretary of State directed, and while so detained should be deemed to be in lawful custody. In *Ex parte Sacksteder* (1), I think that Pickford L.J. took the same view that I have expressed of this provision. The object of the paragraph, in my opinion, is to provide that once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment, which he can do later.

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(1) Vaughan 135.

(2) [1917] A. C. 260.

The other points made by Mr. Williamson can, I think, be disposed of shortly. It appears that when, under para. (5.) of the regulation, the appellant was informed of the grounds on which the order had been made against him and was furnished with particulars to enable him to present his case to the advisory committee, those grounds stated that he had been concerned in acts prejudicial to the public safety, instead of saying that he was of hostile associations, which was the ground on which the order was in fact made. This was unfortunate, but the appellant was not and could not have been in any way prejudiced. He had been served with a true copy of the actual order, and the particulars given to him, or at least most of them, clearly stated why he was regarded as of hostile associations. He had the two documents and could have called the attention of the committee to the discrepancy, but he did not. Moreover, a mistake in the document served on him after he was in custody cannot, in my opinion, invalidate the original detention or render its continuance invalid. It is the actual order signed by the Secretary of State that is the governing document, and it is this document that the return should disclose. Could he show that he was in some way prejudiced, or had suffered damage, it may be that he could bring an action against somebody, or, it may be, if no notice was served on him, he could obtain a mandamus, but, in my opinion, his detention is in no way invalidated. Nor does the later document served on him in truth show that in fact he was detained for some reason other than what the original order stated, because the particulars show that a case existed, if the facts were believed, for regarding him as of hostile associations. The other point was that he complained that he had not been informed of his right to make representations to the Secretary of State. The Divisional Court regarded this complaint as untrue, and I agree with their opinion, so no more need be said. In any case it is a satisfaction to know that the appellant's case has been heard by the committee, and with the particulars before them I cannot doubt that they applied their minds to the question whether the appellant was of hostile association and to any objections to the order which he had to make. With the result of their deliberations we are not concerned. In my opinion, this appeal fails on all grounds and should be dismissed.

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(1) [1918] 1 K. B. 578, 584.

To avoid any misunderstanding, I desire to add that, both in the present case, and in *Ex parte Lees* (1), the applicants themselves exhibited to their affidavit copies of the orders under which they were detained, and no question was raised as to the accuracy of the copies. But cases may arise where persons who are detained, whether under Defence Regulations or otherwise, do not and perhaps cannot inform the court of the order or warrant under which they are detained. In such a case, if the court sees fit to grant an order nisi or summons to show cause, it will be necessary for the person who has the custody of the prisoner to make an affidavit exhibiting the order or warrant under which he detains the prisoner. Although, as I have pointed out above, the old procedure did not require a return to be verified, at any rate in the first instance, modern practice does require an affidavit, and care should be taken in those cases under the regulations to exhibit the actual order signed by the Secretary of State, which alone is the authority for detaining the prisoner.

(1) [1941] 1 K. B. 72.

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SCOTT L.J. I should like to add that I entirely agree with the latter part of the judgment of Goddard L.J., with the subject-matter of which I did not deal in detail.

Appeal dismissed.

Solicitors for appellant: *Oswald Hickson, Collier & Co.*
Solicitor for respondent: *Treasury Solicitor.*

A. W. G.

DAVIES *v.* TENNANT.

1941
Oct. 31.

Mines — Coal mine — Workmen's examiners — Appointment of three persons—Validity—" Mining engineer "—Application of statutory rules to appointment of workmen's examiners—Certificate " stating " the result of the voting "—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 16, *sub-s.* 1—*St. R. & O.* 1912, *No.* 634.

By the Coal Mines Act, 1911, s. 16, sub-s. 1, the workmen employed in a mine may appoint two persons, not being mining engineers, but with practical mining experience, to inspect the mine. By sub-s. 2 every facility is required to be given by the owner, agent, or manager for such inspection, and by sub-s. 3 a failure to give such facilities is an offence against the Act.

By St. R. & O. 1912, No. 634, r. 1, in any case where the views of the workmen are required to be ascertained for any of the purposes of the Act, they are to be ascertained by show of hands at a meeting of the workmen, and a certificate stating the result of the voting is to be sent to the owner, agent or manager of the mine.

Workmen employed at the A. colliery appointed D., G. and J. to be examiners. D. held a first-class certificate of competency as a colliery manager issued by the Mines Department. The appointment was notified to the manager of the mine in a letter stating the names of the three persons, but not the number of votes cast for them respectively by the workmen. The manager refused to permit D. to examine the mine, on the grounds (1.) that the appointment of three persons was invalid; (2.) that he was a mining engineer and, therefore, disqualified; (3.) that the rule had not been complied with in that the " result of the voting " had not been stated:—

Held, that the appointment of D. was invalid, since the workmen were not entitled to appoint more than two persons.

Semble, (1.) the mere holding of a first-class certificate of competency as a colliery manager was no evidence that D. was a

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"mining engineer" within the meaning of s. 16; (2.) assuming that St. R. & O. 1912, No. 634, r. 1, applied to the appointment of examiners (as to which *quaere*), the letter containing the names of the persons appointed was a sufficient "certificate stating the "result of the voting."

CASE stated by Glamorgan justices.

An information was preferred by the appellant, William Charles Davies, against the respondent, Alfred John Tennant, alleging that on July 12, 1940, he, being the manager of the Aberaman Colliery, Aberdare, a mine within the meaning of the Coal Mines Act, 1911, unlawfully refused to afford facilities to inspect the mine to the appellant, he being one of the two persons appointed under s. 16, sub-s. 1, of the Act (1) to inspect the mine on that day.

The following facts were proved before the justices. At all material times the appellant held a first-class certificate of competency as a colliery manager issued by the Mines Department, and the respondent was the manager of the colliery. On February 10, 1940, a meeting of the workmen of the colliery had appointed G. P. Greening and B. B. James to be the two examiners for 1940 under s. 16 of the Act. That resolution had never been rescinded. The appointment of the two examiners was notified to the respondent on February 17, and he accepted it by letter dated February 19. On March 30, the respondent heard from Greening (who was

(1) Coal Mines Act, 1911, s. 16, sub-s. 1: "The workmen em-"ployed in a mine may, at their "own cost, appoint two of their "number or any two persons, "not being mining engineers, who "are or who have been practical "working miners and have had "not less than five years' experi-"ence of underground work, to "inspect the mine, and the persons "so appointed shall be allowed once "at least in every month, accom-"panied, if the owner, agent, or "manager of the mine thinks fit, "by himself or one or more "officials of the mine, to go to "every part of the mine, and to "inspect the shafts, roads, levels, "workings, air-ways, ventilating "apparatus, old workings, and "machinery, ..."

Sub-s. 2: "Every facility shall "be afforded by the owner, agent, "and manager and all persons in "the mine for the purpose of the "inspection. . . ."

Sub-s. 3: "If the owner, "agent, or manager, or any other "person refuses or neglects to "afford such facilities as afore-"said . . . . he shall be guilty "of an offence against this Act."

also chairman of the Aberaman lodge of the South Wales Miners' Federation) that the appellant desired to examine the colliery on the Monday following. On the same day the respondent informed the secretary of the lodge that the workmen had already appointed two examiners. Greening thereupon convened a meeting of the workmen which was held on April 6. At that meeting the appellant, Greening and James were appointed by a majority of the workmen to be the persons to inspect the mine on the workmen's behalf, pursuant to s. 16. This was notified to the respondent in a letter of the same date signed by the chairman of the meeting, which stated that the workmen had appointed the three men, but did not state the number of votes cast for each. The respondent thereupon pointed out to the secretary of the workmen that the appointment of three examiners was not in accordance with the Act, and requested the workmen to appoint two examiners. After some correspondence between the appellant's solicitors and the respondent, the appellant and Greening presented themselves at the mine on July 12 to make an inspection, and the appellant was refused permission to do so by the respondent.

The justices, in dismissing the information, decided: (1.) that, on February 10, Greening and James were duly appointed for the year 1940 to be the two examiners under s. 16; (2.) that, on April 6, and subsequently, the appellant was a mining engineer, and, consequently, ineligible for appointment; (3.) that, no ballot having taken place at the meeting on April 6, a certificate stating the result of the voting was unnecessary, and that the provisions of St. R. & O. 1912, No. 634 (1), if they applied, had been complied with; (4.) that the resolution of April 6 appointing three workmen's examiners was contrary to s. 16 and that the appointment of the appellant for this reason also was invalid,

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(1) St. R. & O. 1912, No. 634 (an Order made by the Secretary of State pursuant to s. 118 of the Act), r. 1: "In any case where "the views of the workmen or "any part of the workmen in any "mine are required to be ascer"tained for any of the purposes "of the Act, they shall, unless a "ballot is expressly required by "the Act, be ascertained by a "show of hands at a meeting of

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inasmuch as Greening and James had already been duly appointed on February 10, and their appointment had never been rescinded; (5.) that the appellant was not entitled to present himself on July 12 to make an examination; (6.) that the respondent had not refused facilities to examiners duly appointed, and, therefore, was not guilty of any offence.

Paull K.C. and *Godfrey Parsons* for the appellant. Sect. 16 lays down no rule as to the method by which the workmen are to appoint examiners, and it is legitimate to appoint a panel, and to delegate to the chairman of the workmen's meeting the duty of nominating two of the persons on that panel as examiners, when the occasion arises. Such a procedure, particularly in war time, is useful, as an examination may be urgent, and, if one of the two examiners happened to be unavailable, delay would be caused if a workmen's meeting had to be convened. So the resolution of April 6 means: " We elect the appellant and Greening as the persons "to examine the mine if possible, but if either is unable to "act, then James is to take his place." Alternatively, it is a good appointment of the first two persons. There was no evidence to justify the finding that the appellant was a mining engineer. The only evidence was that he held a first-class certificate of competency as a colliery manager. St. R. & O. 1912, No. 634, r. 1, does not apply to the election of examiners under s. 16. The rule is concerned with questions on which it is necessary to ascertain the views of the workmen, e.g., whether they desire the provision of pit-head baths under s. 77. If, however, the rule does apply, the letter of April 6 was a sufficient compliance with it.

Havers K.C. and *Carey Evans* for the respondent. The appointment of April 6 was void. Greening and James had already been appointed. Their appointment could have been

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"the workmen entitled to vote of "which not less than three days' "notice shall be given by a notice "posted at the pithead specifying "the time and place of meeting. "A certificate stating the result "of the voting and signed by the "person presiding at the meeting "shall be forthwith delivered to "the owner, agent or manager of "the mine."

rescinded either by an express resolution or by the inconsistent appointment of two other persons, but not by the pretended appointment of the same persons with an additional person. Sect. 16 does not authorize the appointment of a panel of examiners from which the chairman is to nominate two, although such a scheme might be convenient, nor can the appointment of the appellant, Greening and James be treated as a valid appointment of the first two men. If the workmen had been told to vote for only two of the three men, non constat that the appellant and Greening would have been elected. This being a criminal charge, it was for the prosecution to prove that the appellant was a duly qualified person, and not for the defence to prove that he was not, but the first-class certificate of competency is some evidence on which the justices could find that he was a mining engineer, having regard to the qualifications required of colliery managers in s. 5 and the fact that they have to pass an examination by a Board for Mining Examinations under s. 9.

St. R. & O. 1912, No. 634, r. 1, applies to the appointment of examiners under s. 16, sub-s. 1, and a mere list of names is not such a "result of the voting" as is required to be certified. The mine owner, agent or manager is entitled to demand a ballot in certain cases, and it may be most material that he should know whether a resolution was carried by a large majority at a fully representative meeting, or by a narrow majority at a poorly attended meeting. In the latter case it might be in the interest of the men no less than himself to demand a ballot.

VISCOUNT CALDECOTE C.J. In my opinion, the justices came to the right conclusion when they held that the resolution of April 6 was invalid as being contrary to the provisions of s. 16 of the Act. Mr. Paull has submitted that the resolution can be read in a way which is agreeable to the provisions of s. 16 by supposing that it was a nomination in order of the three persons, so that the first two, at any rate, were entitled to inspect the mine in accordance with s. 16, sub-s. 1. I do not think that that is a possible view.

The section is quite explicit. It provides that two persons, not three, may be appointed by the workmen in the mine. Obviously, if three persons were appointed in professed conformity with the powers given by s. 16, difficulties would arise as to which of them should present themselves to inspect the mine, and it is not impossible that the three persons themselves might disagree as to which two of them were finally to be treated as having the necessary authority.

That being so, we uphold the decision of the justices on this point, the determination of which decides this appeal, but I wish to say a word on the way in which s. 16 should be approached. Sect. 16, as Humphreys J. has observed during the argument, leaves it open to the workmen to conduct their meeting as they please and no particular machinery is prescribed. I can well understand the wish of the workmen that there shall be available at all times two persons who have been appointed by the workmen as fit and proper to make the inspection, and if this section is worked with common sense, there ought to be no great difficulty in having at any given moment two such persons. I can appreciate the desire of the workmen that the power which is given them by the section should be interpreted in such a sense that it is really effective for their protection.

We have been asked to express an opinion on two other questions which have been submitted to us, although our observations may be only obiter dicta. In my view, on the facts stated in the case, the justices had no evidence before them on which they could find that the appellant was a mining engineer and, therefore, disqualified from acting as examiner. It is not necessary to discuss some of the questions which have been raised concerning the application of St. R. & O. 1912, No. 634, which was made under s. 118 of the Act, because, if it applies, I think that r. 1 has been complied with and that a certificate in conformity with that rule was given. I find it unnecessary to express an opinion whether or not the rules contained in the statutory order apply. I am not prepared to express a final or certain opinion on that matter, but my inclination is to think that Mr. Paull's submission is right, and that, in such a case as this, s. 118 and the rules made under it are not relevant.

HUMPHREYS J. With regard to the first question which has been argued, namely, whether the appointment of three persons on April 6 was or was not valid, I have arrived at the same conclusion as my Lord and for the same reasons. As my Lord has said, the opinion of the court being that the appointment was not valid, that must dispose of the case. We have, however, been asked to express our views on two other points. My opinion (and I confess it is a tolerably clear one) on the second question, is that there is no evidence in the case before us on which the justices could find that the appellant was a mining engineer. It is impossible to say that a person is a mining engineer merely because he is qualified for something quite different (1).

I have experienced great difficulty in coming to any conclusion whether s. 118 and the statutory rules made under that section have any relation to an appointment under s. 16, sub-s. 1. On the whole I am inclined to think that the section and the statutory rules apply to such a case as the present, but my opinion is by no means strong or clear. I think, however, that, assuming that the rules do apply, r. 1 has been complied with. I should be sorry if it were necessary to hold that the letter of April 6 did not constitute a good certificate under the rule. Such a certificate, which need not be in any particular form except that it must be signed by the person presiding at the meeting, must state the result of the voting. In my opinion, since no ballot was required, the letter did state the result of the voting when it says that in consequence of the voting A., B. and C. had been elected. That is the result of the voting, and anything more would be the details of the voting. I observe, moreover, that a certificate in precisely the same form was given with regard to the earlier election of two persons as examiners and was accepted as satisfactory by the manager of the mine. When a dispute arose whether the appellant was qualified for appointment to inspect the mine the point was never raised in the correspondence that no certificate had been given. It was merely an afterthought, possibly one of those technical legal arguments which are sometimes discovered by the advocate in a police court and which have never previously entered the heads of either of the parties.

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(1) *Reporter's Note.*—No reference was made in the Divisional Court to the Mining Examinations (Certificates of Competency) Rules, 1933 (St. R. & O. 1933, No. 1166), r. 4, which requires applicants to possess a knowledge of mathematics, physics (including electricity), chemistry, geology and *engineering science*, and sets out a detailed syllabus for first- and second-class certificates respectively. These rules replaced, without material alteration, rules made in 1912. (St. R. & O. 1912, No. 1151.)

Lewis J. I agree. I am quite satisfied that the appointment of the appellant was not a valid appointment, because he was appointed with two other persons and there was no power to appoint three persons. That decision is sufficient to dispose of the case. I entirely agree with what Humphreys J. has said with regard to the question whether or not the appellant was a mining engineer. There was no evidence on which the justices could find that he was. I confess to having very considerable doubt whether or not the St. R. & O. 1912, No. 634, applies to this case. My feeling is that it does, but I do not wish to express any definite opinion on the matter. It is not necessary for the purpose of this case to decide it, and I say no more.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondent: *Savage Cooper & Wright, for W. H. F. Barklam, Cardiff.*

J. W. H.

JONES *v.* SHERWOOD.

1941
Oct. 17.

Criminal law — Conviction — Uncertainty — Assault or battery — Separate offences—Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 42.

The appellant was charged with, and was convicted of, having committed an assault or battery:—

Held, that the conviction was bad as it was for alternative offences since a person may be guilty of an assault without being guilty of a battery.

Dictum of Avory J. in *Rex* v. *Surrey Justices. Ex parte Witherick* [1932] 1 K. B. 450, 452 applied.

Case stated by justices.

At a court of summary jurisdiction sitting at Bishops Castle, Salop, an information was preferred by the respondent, George Albert Sherwood, under s. 42 of the Offences against the Person Act, 1861 (1), against the appellant, Theodore Ellis Jones, for that he on December 28, 1940, did unlawfully assault or beat the respondent.

On the hearing of the information, the respondent alleged that on December 28, 1940, at the Six Bells Inn, Bishops Castle, the appellant approached him in a threatening manner and seized him by the throat and pinned him against the wall. The respondent gave evidence in support of his allegation and was cross-examined by the appellant's solicitor. Other evidence in support of the respondent's allegation was given. At the close of the respondent's case the appellant's solicitor submitted that he had no case to answer as he contended that the summons was bad in form and embarrassing for uncertainty in that it charged the appellant for that he did assault or beat the respondent whereas it should have charged the appellant either with having assaulted the respondent or with having assaulted and beaten him. The justices invited the appellant's solicitor, without prejudice to his submission, to proceed with the case and call his evidence that they might consider the

(1) Offences against the Person Act, 1861, s. 42: "Where any "person shall unlawfully assault "or beat any other person, two "justices of the peace, upon com-"plaint by or on behalf of the "party aggrieved, may hear and "determine such offence, and the "offender shall, upon conviction "thereof before them" be sentenced to imprisonment or to pay a fine.

evidence and the submission at the close of the case. This was done, and at the close of the evidence the appellant's solicitor renewed his submission.

The justices, being of opinion that the summons was good in that in using the word "or" it followed the wording of the statute under which the information was laid, and that such wording followed the definition of common assault, held that the summons was good in form and they, accordingly, convicted the appellant for that he on December 28, 1940, at Bishops Castle, within the county of Salop, did unlawfully assault or beat the respondent contrary to the Offences against the Persons Act, 1861.

The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

W. Arthian Davies for the appellant. Both the information and conviction were bad for uncertainty. A person may commit an assault on another person without committing a battery on him. Avory J. said in *Rex* v. *Surrey Justices. Ex parte Witherick* (1): "On consideration of this section, however, I "have come to the conclusion that it contemplates two separate "offences . . . . but if a person may do one without the other, "it follows as a matter of law that an information which "charges him in the alternative is bad. It is an elementary "principle that an information must not charge offences in "the alternative, since the defendant cannot then know with "precision with what he is charged and of what he is convicted "and may be prevented on a future occasion from pleading "autrefois convict." That passage from Avory J.'s judgment puts the principle quite clearly and completely covers the facts of the present case. In *Rex* v. *Wells* (2), the defendant was charged with driving at a speed or in a manner which was dangerous to the public, and it was held that a conviction in those terms was bad because he had been charged in the alternative.

Werninck for the respondent. The respondent is content with the finding of the justices that he has been assaulted. This case is different from the cases that have been cited

(1) [1932] 1 K. B. 450, 452.

(2) (1904) 68 J. P. 392.

because here there is only one offence which could be committed in either of two ways. The offence of common assault was complete on proof of the assault without proof of any battery or there might be proof of assault and battery, whereas in the cases cited there were two separate statutory offences charged in the alternative. The conviction of an assault was, therefore, good. The appellant cannot be heard to say that he was embarrassed by the charge as he cross-examined the respondent on it. The submission that the charge was bad for uncertainty was taken at the end of the case for the prosecution, and was, therefore, too late.

VISCOUNT CALDECOTE C.J. The appellant was charged with having committed assault or battery. On the facts proved he was guilty of a battery. The justices, however, convicted him in an alternative form, finding him guilty of assault or battery. I think that that conviction is bad on the same grounds as the conviction in *Rex* v. *Surrey Justices. Ex parte Witherick* (1) was held to be bad. There are no merits in this appeal, but it is important to maintain the rule that a conviction must not be of an alternative offence, and on that ground the appeal must be allowed and the conviction quashed.

HUMPHREYS J. I am of the same opinion. A conviction of alternative offences is bad. The appellant was convicted of assault or battery, but a person may be guilty of an assault without being guilty of a battery, and, therefore, the case comes within the dictum of Avory J. in *Rex* v. *Surrey Justices. Ex parte Witherick* (1) and the appeal must be allowed.

ASQUITH J. I agree.

Conviction quashed.

Solicitors for appellant: *Churchill, Clapham & Co., for R. E. George, Newtown, Montgomery.*

Solicitors for respondent: *H. W. Davies, for Pryce, Tomley & Pryce, Montgomery.*

R. F. S.

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(1) [1932] 1 K. B. 450, 452.

1941
Oct. 1, 3, 6.

GIBSON *v.* MITCHELL (INSPECTOR OF TAXES).

Revenue—Income tax—Income from possessions, other than stocks, shares or rents, out of the United Kingdom—Basis of computation—Abolition of three years' average—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., r.* 2—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29, *sub-s.* 1—*Income Tax, Sch. V., Amendment Order,* 1927 (*St. R. & O.* 1927, *No.* 81).

Sect. 29, sub-s. 1, of the Finance Act, 1926, which enacts that: "Such enactments in the Income Tax Acts as provide that "income tax under Sch. D shall in certain cases be computed on "the full amount of the balance of the profits or gains, or on "the full amount of the income, upon an average of three years, ". . . . shall cease to have effect," and substitutes as the basis of computation "the full amount of the profits or gains or income "of the year preceding the year of assessment," applies to remittances of income arising from possessions, other than stocks, shares or rents, out of the United Kingdom, and taxable under r. 2 of Case V. of Sch. D.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Special Commissioners held on May 30, 1938, J. W. Gibson appealed against assessments to income tax made on him under Sch. D to the Income Tax Act, 1918, for the following years in the estimated amounts shown: 1926/1927, 15,000*l.*; 1927/1928, 20,000*l.*; 1928/1929, 20,000*l.*, additional 2330*l.*; 1929/30, 25,000*l.*, additional 620*l.*; 1930/1931, 25,000*l.*, additional 9266*l.*; 1931/1932 to 1936/1937, 25,000*l.* each year.

In 1926, Mr. Gibson, a civil engineer, was in the Sudan, working for S. Pearsons & Sons, Ld. As the end of this work approached he was asked by the Sudan Government to carry out in his individual capacity certain work in connection with an extension of the Gezira irrigation scheme. He, accordingly, left the service of Pearsons & Sons, and on October 8, 1926, in London, he signed a contract with the Sudan government. The work on the Gezira scheme began on October 8, 1926, and finished in July, 1932. Mr. Gibson received payment for his work entirely in the Sudan. He had no office in the United Kingdom, and only an accommodation address in London. The sole point of principle in issue before the Special Commissioners was whether Mr. Gibson was assessable in respect of his income under Case I. or Case II. of Sch. D (trade or professional profits not taxed under any other schedule) as claimed by the Crown, or whether liability only arose under Case V. of Sch. D (income from possessions out of the United Kingdom) as he himself contended. The commissioners held that the control of Mr. Gibson's business was situated abroad, and during all the years in question was carried on wholly outside the United Kingdom. They discharged the assessments for 1926/1927 and 1927/1928 (during which years Mr. Gibson carried on his business in partnership), and also, by agreement, the assessments for the years 1933 to 1937. Further, they held that the liability of Mr. Gibson for the years 1928/1929 to 1932/1933 was under Case V. of Sch. D, and was to be computed, in accordance with r. 2 of Case V. (1), only on the amounts of income remitted to the United Kingdom.

The parties disagreeing as to the basis on which the liability should be computed under Case V., r. 2, for the years 1928/1929 to 1932/1933, a further hearing took place before the commissioners on December 4, 1939. The question for determination was whether, as the Crown contended, the provisions of s. 29, sub-s. 1, of the Finance Act, 1926 (2),

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(1) Income Tax Act, 1918, Sch. D, Case V., r. 2: "The tax "in respect of income arising from "possessions out of the United "Kingdom, other than stocks, "shares or rents, shall be computed on the full amount of the "actual sums annually received "in the United Kingdom from "remittances payable in the "United Kingdom . . . . on an "average of the three preceding "years as directed in Case I., "without any deduction or abatement other than is therein "allowed."

(2) Finance Act, 1926, s. 29, sub-s. 1: "Such enactments in "the Income Tax Acts as provide "that income tax under Sch. D "shall in certain cases be computed on the full amount of the "balance of the profits or gains, "or on the full amount of the "income, upon an average of three "years, and so much of rr. 1 and 2 "of the rules applicable to Case IV. "of Sch. D as provides that "income tax under that case shall "be computed on the full "amount of the income which "arises, or which has been or will "be received, in the year of "assessment, shall cease to have "effect, and any income tax in "respect of profits or gains or "income chargeable under Case I, "Case II, Case IV, or Case V of

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effectively covered the case of income chargeable under r. 2 of Case V. in the same way as it admittedly covered income chargeable under Case IV. and under r. 1 of Case V.

By the Income Tax, Sch. V., Amendment Order, 1927, para. xi. of Sch. V. to the Income Tax Act, 1918, was amended. Para. xi. relates to statements required to be made "by "every person entitled to or receiving income from possessions "out of the United Kingdom to be charged under Sch. D." In the case of such income falling within r. 2 of Case V. of Sch. D the statement required was of "the full amount of "the actual sums annually received in the United Kingdom ". . . . on an average of the three preceding years." The Order in Council directed that the word "annually" should be omitted, and for the words "on an average of the three "preceding years" there should be substituted the words "in the preceding year, or where the income was first received "after April 6 in the preceding year, the amount received "in the year of assessment."

The commissioners decided that the provisions of s. 29, sub-s. 1, covered income chargeable under r. 2 of Case V, and that Mr. Gibson's liability should be computed in accordance with the basis laid down in those provisions. They, therefore, dismissed Mr. Gibson's appeal and, the figures being agreed, they determined the assessments for the years in question as follows: 1928/1929, 7500*l.*; 1929/1930, 9598*l.*; 1930/1931, 14,712*l.*; 1931/1932, 51,810*l.*; 1932/1933, 17,171*l.* Mr. Gibson appealed.

Terence Donovan for Mr. Gibson.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

Cur. adv. vult.

1941. Oct. 6. LAWRENCE J. The question in this case is

"Sch. D which would but for the "foregoing provisions of this "section have been computed as "aforesaid shall be computed, ". . . . on the full amount of "the profits or gains or income of "the year preceding the year of "assessment."

whether or not the words of s. 29, sub-s. 1, of the Finance Act, 1926, are apt to apply to r. 2 of Case V., which deals with the computation of tax in respect of income arising from foreign possessions other than stocks, shares and rents. Mr. Donovan contends that the words are inapt on the ground that the full amount of the income in such a case is not the amount received in the United Kingdom, but the full amount of the income from the possession, and that the express mention of the full amount which has been or will be received in the United Kingdom with reference to Case IV. supports this construction. Mr. Donovan also contended that s. 23 of the Finance Act, 1927, had no application to r. 2 of Case V. For the Crown it is contended that the words are not inapt to apply to r. 2 of Case V.; that proviso (*b*) of s. 29 clearly applies to both rules of Case V.; that the legislature in the Finance Act, 1927, s. 43, and the Privy Council in the Income Tax, Schedule V., Amendment Order, 1927, so construed them; that the courts have assumed them to have this meaning: see *Timpson's Executors* v. *Yerbury* (1) and *Carter* v. *Sharon* (2); and that the practice of the Inland Revenue has always been in accordance with this construction.

In my opinion, the argument for Mr. Gibson is unsound. Income tax is not computed under r. 1 of Case V. on the gross income, but on that income less the permitted deductions. "Computation" means "calculation" and unless the tax is calculated on the net income, the wrong amount will be arrived at. That this is the true meaning of "computation" is shown by the words in s. 29, sub-s. 1, "computed on the "full amount of the balance of the profits or gains"—that is, not on the gross amount. If this is so, the words are no more inapt to apply to r. 2 than to r. 1 of Case V. This, in my view, is the true construction of the words; but, in any event, if I am wrong in that, it appears clear that the words are ambiguous, and can, therefore, be construed in the light of the Order in Council and ss. 23 and 43 of the Finance Act, 1927. I am, therefore, of opinion that the decision of the

(1) (1936) 20 Tax Cas. 155. (2) (1936) 20 Tax Cas. 229.

Special Commissioners was correct, and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for Mr. Gibson: *Culross & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

A. W. G.

1941
Oct. 16, 17.

CROOK AND WILLINGTON RATING AUTHORITY *v.* SIMPSON.

Rates — Assessment — Increase — Notice by assessment committee to occupier—Misleading notice—Refusal to pay rates—Duty of justices to issue warrant of distress—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 9.

Having acceded to a proposal by the county valuation committee to increase the assessment of the respondent's premises, the assessment committee made the consequential alteration in the valuation list. The notice of the increase given by them to the respondent under s. 37, sub-s. 9, of the Rating and Valuation Act, 1925, was misleading as seeming to intimate to the respondent that his assessment had not been increased, and the respondent, alleging that in consequence he had lost his right to appeal against the increase in the rate, refused to pay it. The justices, accepting his contention, refused to issue a distress warrant:—

Held, that, the list being by s. 20, sub-s. 1, of the Act conclusive evidence of the values included therein, the justices had no alternative but to issue the warrant.

CASE stated by Durham justices.

A complaint was preferred by the appellants, the Crook and Willington Rating Authority, against the respondent, Simpson, for the non-payment of 14*l.* 4*s.* 3*d.*, rates assessed on him in respect of premises known as Hadrian Lodge, Willington. The justices granted a distress warrant for 4*l.* 15*s.* 1*d.* only, but refused a warrant for the balance. The premises were originally assessed at 23*l.* gross, and 16*l.* rateable, value. The county valuation committee made a proposal that these assessments should be increased to 29*l.* and 22*l.* respectively. The assessment committee, after hearing the respondent's

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objection, acceded to the proposal and in accordance with s. 37, sub-s. 9, of the Rating and Valuation Act, 1925, made the consequential alterations in the valuation list and gave notice of the alterations to the respondent. This notice (which it is unnecessary to set out) was misleading in that on a cursory reading it seemed to intimate that no alteration had been made in the list in consequence of the proposal. The respondent refused to pay the increase in the rate on the ground that, being so misled, he had lost the opportunity of appealing to quarter sessions against it. The justices accepted this contention and refused to issue a distress warrant except as stated. The rating authority appealed.

Astell Burt for the appellants. The justices had no jurisdiction to refuse the distress warrant because they cannot go behind the valuation list which, by s. 20, sub-s. 1, of the Rating and Valuation Act, 1925, "shall be conclusive evidence "of the values of the several hereditaments included in the "list." The appellants had jurisdiction to make the rate for the amount claimed, which was based on the list as amended, and that cannot be questioned before the justices: per Lord Alverstone C.J. in *St. Stephen* (*Churchwardens*) v. *Great Northern and City Railway* (1). The present case is governed by *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply Co., Ld.* (2). There no notice of an increase of assessment was given, but nevertheless it was held that the magistrate had no jurisdiction to investigate the matter, but must issue a distress warrant for the amount based on the increased assessment in the valuation list.

Fortune for the respondent. The notice was obviously misleading and seems to intimate that no alteration had been made in the existing list. No doubt, if the giver of the notice had been a stranger, that would have made no difference, but this was a statutory notice under s. 37, sub-s. 9, of the Act of 1925. The appellants and the justices would be acting "in flagrant violation of good faith" and "contrary to good "morals" if this warrant were to issue after the facts became

(1) (1902) 86 L. T. 390, 392.

(2) [1902] 2 K. B. 125.

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known: per Shearman J. in *Shillito* v. *Hinchliffe* (1). See also Ryde on Rating, 7th ed., p. 915.

Burt replied.

VISCOUNT CALDECOTE C.J. [having stated the facts, continued:] On the face of the notice to the respondent, at first sight, it looks as if there had been no alteration to the valuation list, but a more careful examination of the form would, in my judgment, have shown that there was something amiss with it and that it did not have the effect which it appeared to have. In those circumstances, when the respondent was asked to pay the rate he said that he was not liable, on the ground that it was unjust that he should be asked to pay, in that, in consequence of the form of the notice, he had not had the opportunity which he would have had of appealing, and that, therefore, the position should be exactly as if he had had an opportunity of appealing, had appealed and had been successful.

I will deal with the matter in the first place apart from authority. The argument on the part of the respondent is that, in consequence of what may be described as a slip or a blunder—putting it at the highest—of the assessment committee's officer, the valuation list is to be treated as if it was not in force and as if it did not contain what in fact it contains. That seems to me to be rather a far-reaching proposition. It would mean that in every case where the rating authority made a general rate they would have to inquire whether every formality had been complied with by bodies other than themselves, including, as in this case, the assessment committee. Whether or not it is likely that Parliament would have provided such a scheme it is not necessary for me to consider, because, in enacting s. 20, sub-s. 1, of the Act, Parliament seems to have dealt with what would be the effect of a valuation list with regard to which some informality has occurred. The sub-section provides: "For the purpose "of every rate as defined by this Act . . . . the valuation list as in "force at the time when the rate is made or the value of the

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(1) [1922] 2 K. B. 236, 248.

"premises is to be determined, shall be conclusive evidence of "the values of the several hereditaments included in the list." The argument by Mr. Fortune, on behalf of the respondent, is that, instead of treating the valuation list which was in force at the time when the rate was made as conclusive evidence of the values of the several hereditaments in it, this entry in the list should be treated as a nullity, or, at any rate, as in force and valid only to the extent of the figures which originally appeared in it. Apart from authority, in view of the terms of s. 20, sub-s. 1, and bearing in mind that the mistake which was made was that of the assessment committee and not of the rating authority, I should have felt great difficulty in accepting that argument, the effect of which is that there is something inequitable in acting on the current valuation list because the respondent has not been given the opportunity of appealing.

It so happens, however, that this very question has been before this court on more than one occasion. A great authority on rating questions, Channell J., has stated the position quite clearly. Of the cases to which our attention has been called perhaps the most striking is *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply, Ld.* (1). There the facts were to all intents and purposes the same as here. No notice had been given by the assessment committee of the alteration which they had made in the valuation list, and it was argued, as in this case, that the ratepayer had been thereby deprived of the opportunity of appealing. It is to be noticed that the court did not deal with the facts from the point of view which Mr. Fortune suggested they did, namely, that the ratepayer himself was in default because, not having received the notice, he might have inquired what the decision of the assessment committee was. What was said by Channell J. and agreed to by the rest of the court, consisting of Lord Alverstone C.J. and Darling J., was that the terms of s. 45 of the Valuation (Metropolis) Act, 1869, which corresponds to s. 20, sub-s. 1, of the Act of 1925, were decisive. The terms of that section were: "The valuation list for the time being in force shall be

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"deemed to have been duly made in accordance with this "Act." I think that a fair observation to make is that the language of that section is, on the whole, perhaps not so strict as the language of s. 20, sub-s. 1, of the Act of 1925, which provides: "The valuation list as in force at the time when the "rate is made . . . shall be conclusive evidence." Channell J. said (1): "Now the first question is what that means. It is "suggested by Mr. Bray that 'the valuation list for the time "'being in force' must mean a properly made valuation list, "and that no other is in force. If it meant that, the section "would read thus: 'A valuation list duly made shall be "'deemed to have been duly made'; and that, of course, "is a thing the legislature would never have enacted, and "could not possibly have enacted. It must mean something "different from that." Then (2) he expresses the view which has been stated in other cases, to one or two of which we have been referred. "As I have said sometimes, I think those cases "all depend on whether there is jurisdiction in the rating "authority to make the rate, and whether the rate is good on the "face of it. If the rating authority had jurisdiction to make a "rate, any objection to the rate not apparent on the face of "it cannot be raised on the application for the distress warrant. "Such a rate as that it is the duty of the magistrate to enforce, "and all the cases where the objection can be taken upon the "distress warrant—the well-known cases of non-occupation, "property out of the parish, and so on—are merely instances "of cases in which the rating authority had no jusrisdiction to "make a rate upon a person or upon the property, as the case "may be." That decision seems to me to require us to come to a conclusion which, indeed, I think I should have reached without it.

Mr. Fortune says that the present case comes within the category of cases referred to in *Shillito* v. *Hinchliffe* (3), in which, to use the words of Shearman J., the local authorities were acting in flagrant violation of good faith. I do not take that view. I think that the alteration of the printed form was clumsy and unfortunate, but in the circumstances of this case reliance upon the alteration, notwithstanding the misleading character of the notice, certainly was not an act of ill-faith, let alone flagrant ill-faith. I am entirely unable to see why the power of the rating authority to make and demand a general rate should be affected by the fact that the assessment committee have given a notice that was not as clear as it might be. Again, in view of the terms of s. 20, sub-s. 1, it seems to be an impossible conclusion.

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(1) [1902] 2 K. B. 132.

(2) Ibid. 134.

(3) [1922] 2 K. B. 236, 248.

For these reasons I think that the justices should have issued a distress warrant for the whole sum claimed. It is said that the respondent has been badly treated, and has lost his right of appeal. It may be that he will hereafter have some remedy ; I do not know. It has not been argued before us, and it is not necessary any more than it was in the *Westminster* case (1) or earlier cases, for the court to decide whether a mandamus would issue to order an appeal to be heard. Without deciding that question, it is sufficient to say that the form in which the notice of the assessment committee's decision was given cannot possibly be allowed to whittle down the very definite and clear provisions of s. 20, sub-s. 1.

HUMPHREYS J. I am of the same opinion. In my judgment, there is nothing to be said in favour of the decision of the justices. I go so far as to say that one has only to read the case and see what was the reason given for the decision of the justices to find that it was bad in law on the face of it. The justices set out facts which show that, the respondent being liable to pay rates in respect of a particular hereditament, the local authority desired to increase the rateable value of his hereditament and for that purpose made a proposal in the terms of the Act. They show that he made an objection to that proposal, that the proposal and objection were heard by the assessment committee, and that the decision of the committee was that the objection should be disallowed and the proposal be accepted. It follows from that that their decision was that the valuation list should be amended by increasing

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the amount of the rateable value of this hereditament, and that was done. From that moment, as soon as a rate was duly made, the respondent was bound to pay that rate. He owed it in law. The case goes on to show that he in fact owed in law 14*l.* odd in respect of the rate. The application made to the justices was for a distress warrant based on two facts: first, that he did owe that money, and, secondly, that it had been demanded and not paid.

Why did the justices refuse to issue a distress warrant? They say that their ground was that they were of opinion that the notice of the increase in the rateable value of the hereditament given to the respondent was not sufficiently explicit, and that, consequently, it was bad. What are their powers? I agree with my Lord that it is not necessary to consider all the cases which have held that the duties of justices in dealing with an application for the issue of a distress warrant for rates are limited and well defined. If the law is—as I think that we are bound to assume that it is—as stated in the judgment of Channell J. in the *Westminster* case (1), then, to use Channell J.'s words, "If the rating authority "had jurisdiction to make a rate"—in the present case nobody pretends that they had not—"any objection to the "rate not apparent on the face of it cannot be raised on the "application for the distress warrant. Such a rate as that it is "the duty of the magistrate to enforce."

How then comes it that the justices here refused to enforce that rate on the ground that the notice was not sufficiently explicit? The notice in question is one with which the rating authority had nothing whatever to do. It is the notice which the statute requires should be sent out on behalf of the tribunal which has heard and determined the proposal to alter the valuation list and the objection to it. By some stupid error the notice which was sent out under the hand of the clerk to the assessment committee is in a form which, I entirely agree, is quite likely to be misleading. There is no statement in the case that it did mislead the respondent, but it might have done so. Assuming that it did, what possible ground can

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that be for the justices to say: "We refuse to issue a distress "warrant although he owes the money"? No one could go behind the alteration which had been made in the valuation list. There is no doubt that the rateable value of the premises was the amount to which it had been raised. What justification can there be for the justices saying: "Because some other "body has made a mistake in a document which it sent to the "ratepayer, and, it may be, he did not understand his position, "therefore, we refuse to make him pay for the benefit of the "public the rates which in law he owes"? I repeat that for my part I think that their decision is bad on the face of it.

It was sought by Mr. Fortune to support the action of the justices on the ground that it would be inequitable or unjust that the respondent should have to pay these rates. The question is not whether or not it is unjust that he should pay the rates. It is the law that he should pay them. Many people think that it is very unjust that they should have to pay the income tax which they have to pay, but nobody has yet been bold enough to suggest that for that reason a court may say: "We will not insist on this person paying his "income tax, because we think it has been put much too "high." To my mind, it is absurd to say that here there is any ground in equity or justice why the respondent should not be required to pay, and, moreover, it is to be observed that in the case stated, from beginning to end, there is not a word about bad faith on the part of anybody.

For these reasons and for the reasons which my Lord has given I agree in the result.

ASQUITH J. I agree. It appears to me that the *Westminster* case (1) covers and concludes this matter. Faced with that decision Mr. Fortune relied on *Shillito* v. *Hinchliffe* (2), but to enable him to succeed on the passage which he cited from that case he would have to establish the proposition that the proposed issue of a distress warrant by A., pursuant to a notice drafted and served by B. which might have misled the

(1) [1902] 2 K. B. 125.

(2) [1922] 2 K. B. 236, 248.

ratepayer, would amount to a flagrant breach of good faith by A. That proposition needs only to be stated for its absurdity to be manifest.

Appeal allowed.

Solicitors for appellants: *Sherrard & Sons, for R. Marquis & Co., Crook.*

Solicitors for respondent: *Jaques & Co., for J. E. Freeman & Son, Darlington.*

W. L. L. B.

C. A.

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Oct. 22, 23; Nov. 6.

COLE AND ANOTHER *v.* LYNN.

Deed of Arrangement—Assignment of debtor's property for benefit of creditors—Covenant by creditors not to sue debtor—Rights of creditors against sureties reserved—Right of surety to be indemnified by debtor.

By a deed of arrangement executed by a debtor for the benefit of his creditors, in which the debtor agreed that his property in the trustee's hands should, after the discharge thereout of certain expenses, be divided among the creditors "by way of "dividend in like manner and with the like priorities and in all "respects as in bankruptcy," the creditors covenanted not to "sue . . . . the debtor or his estate," but it was also provided that "these presents shall not in anywise prejudice or affect the "rights or remedies of the creditors against any surety or "sureties." A surety, having made payment under his guarantee to a creditor, claimed to be indemnified by the debtor.

Held, that the reservation, as between creditors and debtor, of the rights of the creditors against any surety, imported the continuance unimpaired of a surety's right of indemnity against the debtor.

Kearsley v. *Cole* (1846) 16 M. & W. 128, and *Close* v. *Close* (1853) 4 De G. M. & G. 176, followed.

APPEAL from Judge Hurst at Croydon county court.

On August 29, 1936, Mrs. Mary Lynn, the mother of the defendant, deposited the title deeds of certain of her property with Barclays Bank to secure the existing and future liabilities of the defendant to the bank. On September 9, 1938, the defendant executed a deed of arrangement for the benefit of his creditors. By that deed, which was substantially in

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common form, the debtor agreed with the other parties thereto, namely, the trustee under the deed and his creditors, that the trustee, after applying the debtor's property in his hands in discharge of certain charges and expenses, should " divide "and distribute from time to time the residue of the said "trust money between and amongst all and every the creditors "of the debtor parties hereto . . . . by way of dividend in "like manner and with the like priorities and in all respects "as in bankruptcy . . . ." The creditors, including both the bank and the debtor's mother, covenanted with the debtor that they would not "sue arrest attach or molest the debtor "or his estate for or on account of the debts due to the creditors "respectively from the debtor . . . . provided . . . . that "these presents shall not in anywise prejudice or affect the "rights or remedies of the creditors against any surety or "sureties or any person or persons other than the debtor . . . ." At the date of the deed the defendant owed 811*l.* to the bank and 203*l.* to his mother, against whose property, comprised in the deposited deeds, the bank also had a claim in respect of the defendant's indebtedness to them. The property of the defendant comprised in the deed of arrangement was realized by the trustee and claims to rank as creditors were made by (inter alios) the bank for 800*l.* and Mrs. Lynn for 203*l.* The amount realized by the trustee proved insufficient to satisfy the claims in full, and on April 21, 1941, the plaintiffs, the executors of Mrs. Lynn (who had meanwhile died), paid 15*l.* to the bank on account of the bank's claim against the property of Mrs. Lynn.

In the present action the plaintiffs claimed to be indemnified by the defendant in respect of that sum. The defendant pleaded that, in view of the terms of the deed of arrangement, the plaintiffs were not entitled to the indemnity. The action was tried on July 21, 1941, before Judge Hurst, who gave judgment for the plaintiffs. The defendant appealed.

W. A. L. Raeburn for the defendant. The county court judge was wrong in holding that the debtor's mother, in assenting to the deed of arrangement, only bound herself

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not to sue for the 203*l*. The effect of the deed was to release the debtor from any contingent liability either to his mother or to anyone claiming through her. It would defeat the object of the deed, which was to prevent double proofs in respect of the same debt, if, when the bank had recovered against the surety in respect of the debt, the surety could go behind the deed and sue the debtor. A creditor who assents to a deed of arrangement cannot reserve his rights against the future assets of the debtor. The deed puts the debtor into the same position as if he had become bankrupt, and under s. 28 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), sureties who have provable debts lose their rights by the discharge of the bankrupt. [He referred to *In re Paine. Ex parte Reid* (1), and *In re Blackpool Motor Car Co., Ld.* (2), and contended that *Close* v. *Close* (3) did not touch the present case.]

Horner for the plaintiffs. *Kearsley* v. *Cole* (4) is on all fours with the present case and it was there held that a surety was entitled to recover against the debtor. That decision was approved in *Bateson* v. *Gosling* (5), which was referred to in *In re Whitehouse* (6). Deeds of arrangement are matters of contract, and, if the rights of creditors against sureties are reserved, a surety who has paid a creditor retains his right of indemnity completely unimpaired against the debtor: see per Turner L.J. in *Close* v. *Close* (3).

Raeburn in reply. *Kearsley* v. *Cole* (4) is distinguishable, because the decision there turned mainly on whether the assent of the plaintiff to the deed precluded him from suing. There was no reference in the deed to the bankruptcy laws, and it is to be inferred that they were not in any sense deemed to be imported.

1941. Nov. 6. Clauson L.J. read the judgment of the court (MacKinnon and Clauson L.JJ. and Hallett J.), which, after stating the facts, continued: The arguments urged by the defendant as a defence to the claim are as follow. He

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(1) [1897] 1 Q. B. 122.
(2) [1901] 1 Ch. 77.
(3) (1853) 4 De G. M. & G. 176.
(4) (1846) 16 M. & W. 128.
(5) (1871) L. R. 7 C. P. 9.
(6) (1887) 37 Ch. D. 683.

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says, (1.) that, on the true construction of the deed, the admitted assent of the mother to the deed operates to afford him the same release as he would have had by virtue of s. 28 of the Bankruptcy Act, 1914, if he had become bankrupt at the date of the deed and had obtained his discharge in due course; (2.) that the effect of s. 28 is to discharge a bankrupt from all debts provable in bankruptcy; (3.) that his liability to indemnify his mother was a contingent liability at the date of the deed and, accordingly, by virtue of s. 30, sub-s. 3, of the Act, is to be deemed (as would be the case in bankruptcy) to be a provable debt and barred by the covenant in the deed not to sue. There are some serious difficulties in the way of the second and third arguments thus put forward, and, although those difficulties were to some extent discussed during the hearing of the appeal, we do not propose to deal with them. It is essential to the defendants' defence that he should make good his first argument, and, in our opinion, he has failed to do so.

On the true construction of the deed of arrangement we are satisfied that, although the provisions of the law of bankruptcy are to be imported into the deed for the purpose of ascertaining the manner and proportions in which the proceeds of sale of the property comprised in the deed are divisible among the creditors, the extent of the protection obtained by the debtor by virtue of the covenant not to sue is dependent entirely on the wording of the covenant not to sue contained in the deed and that the provisions of the law of bankruptcy are not expressly or by implication imported into the terms of that covenant.

It thus becomes necessary to construe the covenant not to sue. The material terms of the covenant are that the assenting creditors (of whom, of course, the mother is one) are not to sue on account of their debts, but that (as appears from the proviso to the covenant) the deed is not to affect the rights and remedies of the creditors against any surety. In our opinion, as a matter of construction, the covenant, as limited by this proviso, imports not only that the deed does not affect any creditor's rights against a surety, but also that the surety's

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consequential rights against the debtor are likewise not affected.

This point of construction was raised as long ago as 1846 in the Court of Exchequer in *Kearsley* v. *Cole* (1) on a deed which is indistinguishable for the material purpose from the present. In delivering his judgment, Parke B. laid it down clearly that a proviso such as that with which we have to deal not only rebuts what would otherwise be implied, namely, the release of the surety as against the creditor, but also prevents the rights of the surety against the debtor, that is, the right to indemnity, being impaired, for, as Parke B. points out, the consent of the debtor that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him, the debtor. This point, his Lordship says, must be considered as settled. We have been referred to a number of cases, but to none which throws doubt on the emphatic language used by Parke B. It may be that this decision of the Court of Exchequer is not binding on this court, but we could hardly now, ninety-five years afterwards, overrule a decision of that court on such a matter as this even if we felt (which we do not) any doubt about its correctness. The point, however, came up before the Lords Justices in *Close* v. *Close* (2) (a decision binding on us), where Turner L.J. adopts the principle that the necessary consequence of the reservation as between creditor and debtor of the rights of the creditor against the surety imports the continuance unimpaired of the surety's right of indemnity against the debtor.

In our judgment the county court judge was right in holding that the defence failed. The appeal will be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs: *Copley, Singleton & Billson, Croydon.*

Solicitors for the defendants: *Braby & Waller.*

(1) 16 M. & W. 128.

(2) 4 De G. M. & G. 176.

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RHODES *v.* SECRETARY OF STATE FOR WAR.

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Oct. 23.

Emergency legislation—Requisition of house—Compensation—Costs of solicitor negotiating compensation—" Expenses reasonably incurred ". . . . for the purpose of compliance with any directions given on "behalf of His Majesty in connection with the taking possession of "the land "—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*d*).

By s. 2, sub-s. 1, of the Compensation (Defence) Act, 1939, "The compensation payable under this Act in respect of the "taking possession of any land shall be the aggregate of the "following sums, that is to say—. . . . (*d*) a sum equal to the "amount of any expenses reasonably incurred . . . . for the "purpose of compliance with any directions given on behalf of "His Majesty in connection with the taking possession of the "land " :—

Held, that the expenses of employing a solicitor to negotiate the compensation payable to a claimant for having complied with directions given in connection with the taking possession of his land are not expenses " incurred for the purpose of compliance "with any directions given on behalf of His Majesty in connection "with the taking possession of the land," and are, therefore, not recoverable by the claimant.

SPECIAL CASE for the opinion of the court stated by the General Claims Tribunal under s. 7 of the Compensation (Defence) Act, 1939.

The Secretary for War requisitioned a house belonging to the claimant, who in due course made a claim for compensation in the prescribed form. The claimant employed solicitors to represent him in the assessment of the compensation and negotiations took place between them and a land agent on behalf of the War Department. Eventually, the amount of compensation was agreed at a rental of 40*l.* a year instead of 45*l.* originally claimed. The claimant then asked for a sum of five guineas for his solicitors' costs. The War Department said that they had a scale under which the claimant was entitled to two guineas in respect of those costs, but the land agent acting on their behalf agreed that the costs should be increased to three guineas. The claimant then sought before the General Claims Tribunal to recover two guineas, being the difference between the five guineas claimed by him and the

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three guineas offered by the land agent. The claim for the costs referred to was based at the hearing on s. 2, sub-s. 1 (*d*), of the Act, it being contended that they were expenses reasonably incurred for the purpose of compliance with directions given on behalf of His Majesty in connection with the taking possession of the land within the meaning of that provision. The War Department contended that they were under no liability under the statute and the offer of payment was ex gratia. In support of this contention, it was argued that s. 2, sub-s. 1 (*d*), of the statute corresponded with reg. 51, sub-r. 1, of the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Act, 1938, where the same language was used, and that the expense of employing solicitors for the purpose of negotiating as hereinbefore stated was not incurred for the purpose of compliance with any directions given on behalf of His Majesty in connection with the taking possession of the claimant's land.

The tribunal requested the opinion of the court on the question whether the claimant was entitled to succeed.

Valentine Holmes for the claimant. The claimant is entitled to the sum claimed by him. The object of the Compensation (Defence) Act, 1939, is to provide adequate compensation for persons who have suffered damage owing to action taken on behalf of His Majesty in the exercise of certain emergency powers, among which is power to requisition property. Sect. 2, sub-s. 1 (*d*), under which the claimant puts forward his claim is couched in very wide terms—"any expenses "reasonably incurred"—and Parliament used language of that scope to enable a claimant to be awarded incidental expenses, such as solicitor's costs, incurred by him in the assessment of the compensation provided by the Act. A claimant is not entitled to consequential damages, but he is entitled to such incidental expenses as those with which we are concerned here. That it was reasonable for the claimant to instruct a solicitor to act for him in the matter of the assessment of the compensation appears from the fact that the notice of claim which the claimant had to complete contained a space for the name of a solicitor, thus indicating that it was expected that a solicitor would be employed to prosecute the claim.

H. L. Parker for the Secretary for War. The court may assume that, although no express direction was given to the claimant in connection with the taking possession of the land, there was an implied direction to him to give up possession. It is not disputed that these solicitor's costs were incurred reasonably, but they were not incurred for the purpose of compliance with a direction given in connection with the taking possession of the land. Sect. 3 of the Act deals with compensation for doing work on land, but there is no provision in that section under which a claimant could recover the expenses of assessing compensation, such as solicitors' costs. If it had been intended to provide in s. 2, sub-s. 1 (*d*), that a claimant could recover such expenses as solicitors' costs incurred in connection with the assessment of compensation, there would have been an express provision to that effect. There is no reason why the two sections should be construed differently. The obtaining of compensation for the taking possession of land is done for the claimant's own benefit in pursuance of a right given by s. 11 of the Act, and is not done in compliance with a direction given in connection with the taking possession of the land. A claim is barred if it is not made within six months of the time when the right to compensation accrued due, but if a claimant does not make a claim for compensation within that time he is not committing a breach of a direction.

VISCOUNT CALDECOTE C.J. This is a case which has been stated for the opinion of the court by the General Claims Tribunal appointed under the Compensation (Defence) Act, 1939.

The special case, raising the question of law which has been discussed, sets out that "the costs referred to were "incurred by the claimant in respect of negotiations as to the "compensation payable conducted by the solicitors on behalf

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"of the claimant before reference of the dispute to the tribunal." It should be observed that compensation in respect of the taking possession of land is dealt with by s. 2 of the Act, and as appears from s. 7, compensation may be settled by agreement, or, in default of agreement, the dispute as to it may be referred to and determined by the appropriate tribunal. If the determination of the claim is not agreed and is referred to the tribunal, the powers of the tribunal may be found in s. 9 of the Act, by sub-s. 1 (*c*) of which it has the power "to award . . . . such sums by way of costs as the tribunal "in its discretion thinks just." That power to award costs is different from the power to award compensation under s. 2.

The only question which we have to consider is whether expenses of the character mentioned in the special case are recoverable as expenses reasonably incurred for the purpose of compliance with any direction given on behalf of His Majesty. We have not been referred to any express direction by the Secretary of State. We have, however, been shown a copy of the notice of requisition and it has been agreed by Mr. Parker, on behalf of the Secretary for War, that this case must be argued on the assumption that implied directions were given in that notice. Nothing could be more reasonable than that persons who are required to hand over their property for the safety of the realm, should seek advice about the measure of compensation which is provided by Parliament. We have been told that, although the Secretary of State for War stands on the strict position that he is not bound to pay anything in respect of such expenses as are in question here, in practice he has paid sums ex gratia in respect of such expenses. The only observation which I wish to make about that, without expressing any opinion whether the Treasury has power to order payments ex gratia to a claimant, is that this court and the tribunal are governed absolutely by the language of the Act, and it is desirable that parties should expect their compensation to be measured by the Act and that they should not be given some sum as a matter of discretion by the Treasury. If the measure of compensation provided by the Act is not the proper one, there is a regular method of dealing with the position. It might be thought more desirable that compensation should be awarded in accordance with the provisions of the Act and not with some scheme or measure of compensation which has been fixed by a government department.

Having said that, I come to the only question which arises for our decision, namely, whether the costs incurred by reason of the negotiations as to the compensation payable being conducted by solicitors on behalf of the claimant are expenses incurred for the purpose of compliance with any directions given on behalf of His Majesty in connection with the taking possession of the land. In the course of the argument a number of imaginary cases have been considered. It is not disputed that the expenses of a solicitor in connection with making arrangements to comply with directions of the authority would be recoverable. Mr. Parker concedes that that would form part of the compensation which the tribunal has the power to assess, but it seems to me that there is a difference between expenses incurred in complying with the directions and expenses incurred in measuring the compensation for having complied with the directions. It may be impossible to assess the compensation until the directions have been complied with, and, although in a proper case it would be fully in accordance with the Act to pay to the claimant the expenses incurred by him in employing a solicitor or surveyor to ascertain what the directions mean and what is required to be done by the claimant, it is a very different thing to say that, when the directions have been complied with, the expenses of employing a solicitor to negotiate the amount of compensation to which the claimant is entitled for having complied with those directions is also recoverable. In my view expenses incurred in measuring the compensation for having complied with the directions are not recoverable as part of the compensation under s. 2, sub-s. 1 (*d*). The question which the tribunal has submitted for our opinion must, therefore, be answered by saying that the sum of five guineas claimed as expenses is not within the terms of s. 2, sub-s. 1 (*d*), and may not be awarded by the tribunal.

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CHARLES J. I agree.

HUMPHREYS J. I also agree, but with regret.

Question answered.

Solicitors for claimant: *Johnson, Weatherall & Co., for Wade, Tetley, Hill & Co., Bradford.*

Solicitor for War Department: *Treasury Solicitor.*

R. F. S.

Applied. BARKWAY *v.* SOUTH WALES TRANSPORT CO., LTD. [1948] 2 All E.R. 460.

Dictum of LORD GREENE, M.R., at p. 155, *not followed.* YOUNG *v.* RANK. [1950] 2 All E.R. 166.

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Oct. 24.

LAURIE *v.* RAGLAN BUILDING COMPANY, LIMITED.

Negligence—Prima facie case—Vehicle mounting or overhanging pavement—Heavily laden lorry—Skid—Speed—Practice—Trial—Submission by defendant's counsel of no case.

In daylight, on a well-made road which, at the material time, was rendered dangerous by being covered with frozen snow, a ten-wheeled, heavily laden lorry was being driven at ten to twelve miles an hour when it skidded and killed the plaintiff's husband on or near the pavement. In an action by the plaintiff in which she claimed damages for her husband's death, alleging negligence by the defendants' driver:—

Held, that, (1.) in considering whether a prima facie case of negligence has been established, no distinction is to be drawn between a case where the wheels of a vehicle actually mount the pavement and one where part of the vehicle overhangs and sweeps across the pavement; (2.) a skid may or may not be due to negligence; (3.) when a road is in a very bad condition a heavy lorry should not be driven at more than a foot pace, and, if necessary, be stopped altogether.

When at a trial counsel for the defendant, after evidence for the plaintiff on the question of liability has been concluded, submits that there is no case for him to answer, the judge should refuse to rule on the submission unless counsel for the defendant makes it clear that he is going to call no evidence.

Decision of Wrottesley J. reversed.

APPEAL from Wrottesley J.

In daylight on a broad, good road, which, at the material time, was dangerous owing to being covered with frozen snow, the defendants' ten-wheel lorry, heavily laden with wood, was being driven at a pace of ten to twelve miles an hour. On its near side a number of persons was standing on the pavement in an omnibus queue, and the husband of the plaintiff was seen by one of those persons crossing the road with the obvious intention of joining the queue. The lorry skidded, knocked down five people in the queue, and killed the plaintiff's husband while he was on the pavement. In an action by the plaintiff in which she claimed damages for the death of her husband which, she alleged, was due to the negligence of the defendants' driver, Wrottesley J. held that the plaintiff had failed to establish liability and he entered judgment for the defendants. The plaintiff appealed.

Beyfus K.C. and *Humfrey Edmunds* for the plaintiff.

Beresford K.C. and *F. Paterson* for the defendants.

Halliwell v. *Venables* (1); *Alexander* v. *Rayson* (2); and *Wing* v. *London General Omnibus Co.* (3) were referred to.

LORD GREENE M.R. stated the facts, and continued: What is the position where a person lawfully on the pavement is struck by a vehicle which, in the ordinary course of things, has no right to be in that position? It is contended on behalf of the plaintiff that the evidence shows that the lorry actually mounted the pavement and there is an admission to that effect in the defence. On the other hand, it is said that the evidence which was led at the trial established that the wheels of the lorry never mounted the pavement, and on that proposition there is based the argument that, whereas, if a vehicle mounts the pavement with its wheels, a prima facie case of negligence is raised, there is no such prima facie case where all that happens is that some portion of the vehicle hangs over the pavement and hits a person who is lawfully on it. I will assume, without deciding it, that the wheels of the lorry in the present case did not actually mount the pavement, but I cannot see that, in considering whether a prima facie case of negligence has been established, any

(1) (1930) 143 L. T. 215.
(2) [1936] 1 K. B. 169.
(3) [1909] 2 K. B. 652.

distinction should be drawn between the position where the wheels of a vehicle actually mount the pavement and that where a portion of the vehicle sweeps across the pavement. In each case the vehicle is where it has no right to be. No vehicle is entitled so to manœuvre itself that any part of it projects over the pavement to the injury of pedestrians who are lawfully there. Reliance for the suggested distinction was placed on *Wing* v. *London General Omnibus Co.* (1), but I am quite unable to find in that decision, which turned on very special circumstances, any justification for such a distinction. In my opinion, precisely the same principle applies to both sets of facts.

That being the position, the plaintiff gave evidence which showed that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the defendants that, assuming a prima facie case of negligence, that circumstance is sufficient to displace the prima facie case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, where a prima facie case of negligence arises, it is shown that the accident is due to a skid which happened without default of the driver, the prima facie case is clearly displaced, but merely to establish the skid does not appear to me to be sufficient for that purpose. As a matter of fact, the present case does not rest there because, in my judgment, the evidence led by the plaintiff, so far from merely establishing a skid which may or may not have been negligent, shows that the skid was due to negligence on the part of the driver. The road was in an extremely dangerous condition. It had snowed earlier in the day. Then it had frozen, and the surface of the road was like glass. Nevertheless, this very heavy lorry was driven at a speed of ten to twelve miles an hour without having any chains on its wheels. I am quite unable to accept the proposition that, when a road is in that condition, a lorry of this kind, loaded in the way in which it was loaded, is entitled to proceed at such a speed. If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of

(1) [1909] 2 K. B. 652.

the driver of the motor car to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot's pace. The evidence here shows clearly that the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed. I, therefore, think that, not only did the fact that part of the lorry swept across the pavement raise a prima facie case to be answered, but also that the evidence was sufficient to call for an answer even if there had been no such prima facie case of negligence.

The course that the trial took was this. After the evidence for the plaintiff had been concluded on the question of liability, counsel for the defendants submitted that there was no case for him to answer. It is unfortunate, I think, that the learned judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, of refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence. That must be regarded as the proper practice to follow and it is to be found very lucidly set out, if I may say so, in the judgment of Goddard L.J., in *Parry* v. *Aluminium Corporation* (1). I do not, however, wish it to be thought that there is any particular magic about that question being asked, because it seems to me that counsel can make it perfectly clear, by words which he uses or by the way in which he acts, that he does not intend to call any evidence, and he must then be taken to have given a negative answer to the question which the judge might otherwise have put to him. In the present case Mr. Humfrey Edmunds, who appeared at the trial for the plaintiff, challenged Mr. Beresford by saying that he assumed that Mr. Beresford was not going to call any evidence. Mr. Beresford did not respond to that challenge and proceeded with his argument. When he was before us he frankly admitted that, if the judge had put to him the question which ought to have been put, he would have said that he did not intend to call any evidence.

(1) [1940] W. N. 44, 46.

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That being so, there can be no question of a new trial. The matter must be dealt with on the evidence as it stands. It follows from what I have said that, in my opinion, on the evidence as it stands, the plaintiff has established liability. The only matter which remains is that of damages, and with regard to that the case did not proceed and we are not in a position to deal with it. The result, therefore, is that the appeal will be allowed on the question of liability and there must be a new trial on the question of damages if the parties are unable to agree them.

GODDARD L.J. I agree.

DU PARCQ L.J. I also agree.

Appeal allowed.

Solicitors for plaintiff: *Vizard, Oldham, Crowder & Cash.*
Solicitors for defendants: *R. I. Lewis & Co.*

P. J. B.

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Oct. 28, 29.

DE BUSE AND OTHERS *v.* McCARTHY AND ANOTHER.

Defamation — Libel — Privilege — Local government — Borough council meeting—Notice—Agenda containing copy of report of committee—Transmission to public libraries—Publication to ratepayers and general public—Metropolis Management Amendment Act, 1856 (19 & 20 *Vict. c.* 112), *s.* 9—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *s.* 2, *sub-s.* 5.

The first-named defendant, as town clerk, sent out a notice convening a meeting of the defendant borough council to consider (inter alia) the report of a committee of the council regarding the loss of petrol from one of the council's depots. Included in the notice was a long agenda of business, and a complete copy of the report of the committee. The notice was not only affixed on or near the door of the town hall, where the council was to meet, but under instructions from the council and in accordance with long established practice, copies were also sent to each of the public libraries in the borough, where they were available for perusal by ratepayers and other frequenters of the libraries. In actions brought by four employees of the council, who complained that words in the report of the committee were defamatory of them, the defendants pleaded that the notices were sent to the public libraries under the implied power conferred on the council by s. 9 of the Metropolis Management Amendment Act, 1856, and in discharge of the duty imposed on them by that section. Alternatively, they pleaded that the council and the ratepayers had a common interest in the subject-matter of the words complained of, and it was the duty of the council, and/or reasonably necessary and proper for the council in the course and/or conduct of its business, to publish the words by all reasonable and convenient means to the ratepayers; and that the occasion was, therefore, privileged :—

Held, (1.) that s. 9 of the Act of 1856 neither provided for nor justified the sending of the notices to the public libraries of the borough; (2.) that there was no common interest between the council and the ratepayers to have what was only a preliminary stage in an investigation communicated to the ratepayers in the form in which it was communicated, and the occasion was, therefore, not privileged.

APPEAL from judgment of Wrottesley J. in consolidated actions tried with a special jury.

The plaintiffs were four employees in the public cleansing department of the Stepney metropolitan borough council, and the defendants were Wm. McCarthy, the town clerk, and the mayor, aldermen and councillors of the borough. In March, 1938, after the discovery of a shortage of petrol at one of the council's depots, and the conviction of two employees of the council for stealing the petrol, the council appointed a committee "to inquire into the circumstances relating to "the loss of the petrol" and to report thereon. At his trial one of the convicted men had made statements tending to implicate a number of his fellow employees, and in their report the committee set out a list of the names of employees who were said to have been implicated, including those of the plaintiffs. The committee stated that the accusations had been reiterated before them, that the employees concerned had emphatically denied the accusations, and that in reaching their final conclusion the committee had deemed it expedient to have a proper regard to the attitude and demeanour of those employees. The report contained in terms no statement that the committee found the charges proved, in whole or in part, but there was a recommendation that the employees named, including the plaintiffs, should be removed from their existing positions and transferred to other positions. On or about February 17, 1939, the defendant McCarthy sent out a notice of a meeting of the council to consider (inter alia) the report of the committee. Copies of the notice, which contained a long agenda and a full copy of the committee's report, were not only affixed to or near the door of the town hall, where the council was to meet, but were also sent to each of the public libraries in the borough. This was admittedly done in accordance with long-standing practice approved and authorized by the council.

The plaintiffs, by their statements of claim, contended that by the words complained of the defendants meant and were understood to mean that each of the plaintiffs had been a party to the stealing of the petrol, and/or that, in relation to the stealing of the petrol by one of the men convicted, each of the plaintiffs had been guilty of conduct so discreditable that he ought forthwith to be removed from his employment. The defendants by their defence relied on a plea that the council, "in ordering copies of the notice of all meetings to be sent to "the public libraries in the borough, were acting under the "implied power conferred on them by s. 9 of the Metropolis "Management Amendment Act, 1856 (1), and in discharge "of the duty imposed upon them by the said section to give "public notice of every meeting of the said council." During the hearing, the defendants obtained leave to amend their defence by adding the following paragraph : " Further, or in "the alternative, the defendant council at all material times "were and are the council for the metropolitan borough of

(1) By s. 9 of the Metropolis Management Amendment Act, 1856 : " Every meeting of any "vestry . . . . may be convened "by transmitting through the "post or otherwise notice, signed "by the clerk to the vestry, to "each vestryman . . . . of the "place and hour of holding the "same, and the special purposes "thereof . . . . and also by "affixing at the same time notice "thereof on or near the door of any "building where the said meeting "is to be holden, and it shall not be "necessary that notice of any "such meeting shall be further or "otherwise signed or published."

By the London Government Act, 1899, s. 2, sub-s. 5, the law relating to the proceedings of administrative vestries was applied to borough councils.

"Stepney, and as such had a common interest with the ratepayers in the said borough in the subject-matter of the words "complained of, and it was the duty of the defendant council, "and/or it was reasonably necessary and proper for the said "council in the course and/or the conduct of its business, to "publish the said words by all reasonable and convenient "means to the said ratepayers. The said council in pursuance "of the said duty and/or interest published the said words in "the said libraries bona fide and without malice, and the "occasion was therefore privileged."

On May 19, 1941, the consolidated actions brought by the plaintiffs were tried by Wrottesley J. with a special jury, and the learned judge ruled that the occasion of the publication was privileged and there was no evidence of malice to be put before the jury, and he directed that judgment be entered for the defendants, with costs. The plaintiffs appealed, asking for judgment or a new trial.

Gerald Gardiner and *Nicholas* for the plaintiffs. The learned judge was wrong in holding that the publication by the defendants in the libraries of the words complained of was privileged. Privilege would attach to the publication of a notice affixed to the door of the town hall, but it would not attach to the publication there of a detailed agenda in which was set out a long report of a committee of the council containing statements defamatory on some person. Still less would such a detailed agenda be privileged if sent to a public library where it could be seen and read by any member of the public. The question whether the notice posted up at the town hall must state what is the nature of the business to be considered at the meeting was referred to but not decided in *Livingstone* v. *Westminster Corporation* (1), but apart from that case there is no authority on the point. The defendants have pleaded that it was in accordance with the regular practice of the council that the town clerk forwarded copies of the notice and agenda to the public libraries, but no practice of the defendants would justify their publication of a libel.

(1) [1904] 2 K. B. 109.

Roberts K.C., *Havers* K.C., *Valentine Holmes* and *Simes* for the defendants. The defendants were under a statutory duty to publish to the ratepayers a notice of the meeting of the council and its purpose by affixing the notice to the door of the town hall. It would be unreasonable to say that publication to ratepayers was privileged, but that, if publication were made to members of the public, that privilege would be destroyed. The ratepayers had a common interest with the council in the publication of the agenda of the meeting and in the result of the inquiry by the committee. It was necessary for the councillors to have sent to them a detailed agenda of the meeting, and no distinction is drawn in the Act of 1856 between the notice of the meeting to be given to councillors and the notice to be affixed to the church door. It is not suggested that the defendants were under an express statutory duty to send a notice of the meeting to the public libraries. That was done in pursuance of a practice which is followed not only by the defendants but also by borough councils generally. The town clerk, in sending notices of the meeting with the agenda to the libraries, was acting under the direction of the council, and the council, in ordering copies to be sent to the libraries, were acting under the implied power conferred by s. 9 of the Act of 1856, and in discharge of the duty imposed on them by that section to give public notice of every meeting of the council. Wrottesley J. was right in holding that the occasion of the publication was privileged, and that ratepayers had a common interest with the council in the publication of the whole of the report of the committee contained in the agenda. It was held in *Rex* v. *Rule* (1) that a member of Parliament to whom a written communication was addressed by one of his constituents, asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct in relation to his office on the part of some public official acting in that constituency, had sufficient interest in the subject-matter of the complaint to render the occasion of such a publication privileged. The court of Queen's Bench adopted the legal canon in *Harrison* v. *Bush* (2) that "a communication made bona fide upon any subject-"matter in which the party communicating has an interest, "or in reference to which he has a duty, is privileged, if made "to a person having a corresponding interest or duty, although "it contain criminatory matter which, without this privilege, "would be slanderous and actionable."

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(1) [1937] 2 K. B. 375.

(2) (1855) 5 E. & B. 344, 348.

[*Hunt* v. *Great Northern Railway Co.* (1) and *Adam* v. *Ward*, per Lord Atkinson (2), were also referred to.] In the present case the council, as custodians of the funds and property of the ratepayers, clearly had an interest and duty to communicate to the ratepayers that there had been a loss of their property, and what steps the council had taken in the matter. The ratepayers were interested not only in the decision of the council but also in the inquiry and the report of the committee. The defendant McCarthy, being a servant of the council and acting on their instructions, stands in the shoes of the council with regard to privilege.

LORD GREENE M.R. In view of the opinion which I have formed on the question of privilege, the matter of malice does not arise for decision. We have heard no argument on it, and it is unnecessary to refer to it again. For the purpose of the present discussion we must assume, although it is not admitted by the defendants, that the words contained in the report of the committee in reference to the plaintiffs were defamatory. The publication complained of was the sending by the town clerk, according to what appears to be the regular practice of the council, of copies of a notice of a meeting of the borough council and the agenda thereof to the public libraries in the borough where they would be available for perusal by anyone entitled to use the libraries, including not only ratepayers, but also members of the public who were not ratepayers and not even electors in the borough. The defence relied on certain statutory provisions. For the present purpose, I do not think it is necessary to go into the details of those provisions, or to see exactly how the present law with regard to giving notice of meetings of borough councils has come into

(1) [1891] 2 Q. B. 189.

(2) [1917] A. C. 309, 334.

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being. It is sufficient to say that by the London Government Act, 1899, the powers of vestries were transferred to borough councils, and that by s. 9 of the Metropolis Management Amendment Act, 1856, it is provided that meetings of vestries, now replaced by borough councils, may be convened by sending notice to each vestryman of the place and hour of holding the meeting and the special purposes thereof three days before the day appointed for such meeting, and also by affixing at the same time notice thereof on or near the door of any building where the meeting is to be held. The section goes on to provide that "it shall not be necessary that notice of any "such meeting shall be further or otherwise signed or "published." It is perfectly clear that that section is limited to the giving of notice to the members of the council and to the affixing of notice on or near the door of the place of meeting. It neither provides for nor justifies the sending of the notice to the public libraries of the borough as was done in this case, yet in the defence it is pleaded that : "The defendant council, "in ordering copies of the notice of all meetings to be sent to "the public libraries in the borough, were acting under the "implied power conferred on them by s. 9 of the Metropolis "Management Amendment Act, 1856, and in discharge of the "duty imposed upon them by the said section to give public "notice of every meeting of the said council." That paragraph, in my opinion, entirely lacks justification. Assuming that the publication to the public libraries of this document was the publication of a defamatory document, no foundation for a plea of privilege is to be found in the assertions contained in the defence.

Before I leave s. 9, I may refer to an argument which was put forward on behalf of the defendants, namely, that the notice which the section requires to be affixed on or near the door of the place of meeting must not merely set out, in terms sufficient to explain, what are the agenda for the meeting, but must also contain the full particulars, documentary and otherwise, which are going to be referred to at the meeting and which it is obviously convenient for the councillors themselves to have. It is said that a notice which falls short of that is not a notice of the special purposes of the meeting. I cannot accept that view. It seems to me that all that the statute requires and justifies is the giving of a notice which specifies, with sufficient clarity, what the special purposes of the meeting are going to be, and that it is impossible to rely on s. 9 as justifying the publication of a report of a committee which is going to be considered at the meeting. The section is considering something much more limited and practicable. In the ordinary way it matters not if the council, for reasons of policy or convenience, think it desirable to exhibit the whole of a document outside the town hall for public inspection, but when the document contains defamatory matter the situation becomes entirely different and what might have been a perfectly harmless act on the part of the council, done from bona fide reasons of convenience, becomes something which the section, in my judgment, does not justify.

The defence based on s. 9 of the Act of 1856, really did not bear investigation. Accordingly, counsel for the defendants applied for leave to amend the defence by inserting a new paragraph, not based on the statutory provisions to which I have referred, but alleging that the council had a common interest with the ratepayers in the borough in the subject-matter of the words complained of, and that it was the duty of the council, and/or it was reasonably necessary and proper for the council, for the conduct of its business, to publish the words complained of by all reasonable and convenient means to the ratepayers. It appears, and Mr. Gardiner very properly admitted, that in the court below the argument proceeded on the basis of such a plea, which is not to be found in the defence as delivered. I wish to say what I have said more than once, that in cases where any important deviation from the pleadings takes place, either in accordance with the ruling of the judge or by tacit consent of counsel at the trial, it is of the utmost importance that that deviation should be put into the form of a proper amendment to the pleadings, that the amendment should be formally applied for, and that the judge should formally rule on it. I take the view very strongly that it is the duty of counsel, in conducting a case, to see that that procedure is regularly followed. If it is not, difficulties always arise in this court. However, the amendment in the present case was admitted by Mr. Gardiner to embody the substantial argument which was conducted below. We, accordingly, allowed the amendment to be made, and the question for us to consider is whether or not the claim of privilege set up by the amendment is established.

The requirements for such a plea can be taken from many passages in judgments, but they are very conveniently stated in the speech of Lord Atkinson in *Adam* v. *Ward* (1), to which du Parcq L.J. referred in the course of the argument. Lord Atkinson said: "It was not disputed, in this case on either "side, that a privileged occasion is, in reference to qualified "privilege, an occasion where the person who makes a com-"munication has an interest or a duty, legal, social, or moral, "to make it to the person to whom it is made, and the person "to whom it is so made has a corresponding interest or duty to "receive it. This reciprocity is essential." I prefer that language—referring to an interest or duty to make the communication—to language, sometimes found, which refers to an interest in the subject-matter of the communication. The latter phrase appears to me to be vague and to leave uncertain what degree of relevance to a particular subject-matter the communication has to bear. Adopting the language of Lord Atkinson, we have to consider, first, what interest or duty the council had to communicate to the ratepayers the report of a committee which the council was proposing to consider and which contained not merely statements with regard to the administration of the petrol supply and the steps which had taken place in connection with the loss of petrol, but also set out the names of employees who had been accused of complicity in thefts of the petrol and made a report and recommendation in relation to them.

I cannot see that it can possibly be said that the council was under any duty to make that communication to the ratepayers. At that stage the matter was, in a sense, sub judice, because the committee's report by itself could have no practical value unless and until it had been considered by the council and the council had come to some decision on it. That decision might have been that the report be adopted, or that the report be not adopted, or that the report be referred back to the committee. The appointment of committees of this kind is part of the internal management and administration of a body of this description, and, whatever the duty or the interest of the council might have been after it had dealt with the report and come to some decision on it, I cannot see that at that stage in the operation of the machinery of the borough's administration there was any duty whatsoever to tell the ratepayers how the wheels were going round. There may well have been a duty, or if not a duty at any rate an interest, of the council to inform the ratepayers of the result of its own deliberations.

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(1) [1917] A. C. 309, 334.

If I am right in thinking that there was no duty to make the communication to the ratepayers at that stage, was there an interest in the council to do so? There, again, I cannot see how it can be said that the council had, at that stage of the inquiries, an interest to communicate to their ratepayers the circumstance that the committee had reported in those terms. It is perfectly true, and, indeed, obvious, that the committee itself had both an interest and a duty to make a report to the council, but there could be no common interest between the council and the ratepayers to have what in the circumstances was only a preliminary stage in the investigation communicated to the ratepayers in the form in which it was communicated. Indeed, Mr. Havers, on behalf of the council, was constrained to agree, and I think his argument logically compelled him to agree, that the line could not be drawn at the formal reports of committees. Assuming his argument to be right, he conceded that, if the council received from an outside source a letter charging either some member or some employee of the council with, say, dishonesty, and the council proposed at a meeting to consider that communication, it would have an interest and a duty to communicate to the ratepayers not merely the fact that it was going to investigate a charge against an unnamed member of its body

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or an employee, but also the actual terms of the letter making the charge and giving the name of the person charged. In my judgment, it would be insufferable if a council, which must be expected to act on reasonable lines, should be in a position to say that a communication of that kind, dealing with a matter which is going to be examined and is on the face of it clearly defamatory, is a thing which they have an interest or a duty to publish broadcast to their ratepayers. The present case is not so extreme as that in the sense that the matter, when it was to be brought before this meeting of the council, had been the subject of investigation by a committee, but, as I have pointed out, that did not bring it to a stage where any effective action was necessarily going to be taken or any confirmation by the council of the committee's report was to be assumed.

Looking at the other side of the picture, I cannot myself see what interest or duty the ratepayers had to receive the communication. It is obvious that ratepayers are interested in the proper administration and safeguarding of their property and in the way in which their council conducts its business, but what I may call the internal working of the administrative machine and all the details of its domestic deliberations in a case of this kind, are things which I should have thought ratepayers are not in general interested in unless and until they emerge in the shape of some practical action or practical resolution.

I do not find it necessary to deal with the argument that, even if privilege had been established for the publication of the report as a communication to ratepayers, nevertheless no privilege protected a communication which laid the whole matter open to the public at large who frequent the public libraries. I do not express any opinion, one way or the other, on that matter.

Therefore, in my opinion, contrary to the view taken by the learned judge, the plea of privilege cannot be made good, but before I leave the case, I wish to refer, for the purpose of distinguishing it, to one case which was relied on by the defendants, namely, *Hunt* v. *Great Northern Railway*

Co. (1). That decision brings out very clearly, in my judgment, the distinction between a case where there was an obvious interest to make the communication and an obvious interest to receive it, and one such as the present where that cannot be said. The defendant railway company had dismissed a guard in their service on the ground that he had been guilty of gross neglect of duty. They published his name in a printed circular which they distributed among their servants, and they stated that he had been dismissed and gave the grounds of his dismissal. I should have thought it could scarcely have been argued in that case that the occasion was not one which made the communication a privileged one because it was clearly to the interest of the railway company to bring home to its employees the type of action which was regarded by it as a proper subject for punishment by dismissal, and it was also to the interest of the employees to know that. There, too, the matter was not in the stage of deliberation, as in the present case. Action had been definitely taken. I cannot help thinking that the decision would have been very different if the railway company, before the meeting of the board or whoever it was who decided to take action, had published to the employees the fact that a man had been charged with gross neglect of duty and that the directors proposed to consider the charge at their next meeting. That would have put a totally different complexion on the case.

GODDARD L.J. I entirely agree. The only plea which was originally set up in the defence was not, in my view, a plea of privilege at all. It was a plea that the council were not only justified in publishing what they did in the manner in which they did it, but were obliged so to act by virtue of s. 9 of the Metropolis Management Amendment Act, 1856. Apart from the fact that that Act provides for notice of a meeting of a vestry (now a borough council) to be affixed on or near the door of the place of meeting and that the notice in this case was sent to the public libraries, the statute does not, in my opinion, justify the council in doing or oblige the council to do anything approaching that which they did. If it had justified them in publishing, or obliged them to publish, this report on the door of the town hall, the fact that a little extra publicity was given to it by sending it to the public libraries might merely result in the plaintiffs being entitled to nominal, or something approaching nominal, damages, but the statute does nothing of the sort. The statute requires that when a borough council is going to hold a meeting, notice shall be given of the time and place at which the meeting will be held and of the special purposes for which it is being held. The fact that the council must state the special purposes of the meeting does not require them to publish libels. It may be that in some particular case the circumstances would be such that it would be almost impossible not to exhibit a defamatory notice or one which might be defamatory. For instance, if one of the special purposes for which the meeting of the borough council was convened was to consider the dismissal of a certain official, I suppose that a notice which said that the special purpose of the meeting was to consider the dismissal of A.B., the medical officer, or the town clerk, or whoever it might be, would be justified under the statute, although it might be said to be defamatory. But when the council is directed to publish the special purposes of the meeting, it does not mean that it is to publish the reports and so forth which will be considered at the meeting.

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(1) [1891] 2 Q. B. 189.

The special purposes for which this meeting of the council was held was the consideration of various reports, and, so far as the case which we are now considering is concerned, all that the statute required was that the notice should state that among the purposes of the meeting was the consideration of the report of a special committee appointed to inquire into the loss of petrol. The council, no doubt, found it convenient to send out to all its members the full agenda of the business which would be brought before them at the meeting, and the councillors, no doubt, desired that, if a report was to be considered at the meeting, a copy of it should be sent to them. There is no doubt that in practice the council do send a copy, or cause a copy to be sent, to the councillors of any report which they will have to consider. Privilege at once obtains to that publication as between the council and the councillors, but, if they or their advisers are of opinion that s. 9 of the Act of 1856 justifies them, by exhibiting a full agenda on the door of the town hall, in making public a libel which there is no necessity for them to make public, the sooner they alter their practice the better, because the statute affords them no defence whatever.

With regard to the amended defence, I can add very little to what has been said by the Master of the Rolls. I can see no ground whatever for saying that, because a committee which has been appointed to inquire into a certain matter has made a report to the council, which the council may or may not adopt, and which they may consider without mentioning names until they have decided whether or not to adopt it adversely to the people named in it, the council can have any interest in informing their ratepayers of the contents of that document, which is, indeed, a confidential document between the committee and the council. If it were otherwise, a very serious state of affairs would result. I expect that borough councils, like other public bodies and public officials, receive many letters making charges or complaints against not only their own members or officials, but against other ratepayers and residents in the borough. If it were held that the publication of this document was privileged and that the council had an interest in communicating it to the ratepayers, we should have to hold that any council which adopted the course of putting in their agenda libellous letters which they had received by way of complaint and then broadcasting it by affixing it outside the town hall, would be protected. It might well be, also, that highly confidential documents would be received by the council and would have to be considered at a council meeting. Complaint, for instance, regarding the conduct of a high official might be made direct to the Minister of Health by some disgruntled ratepayer. The Ministry of Health might refer that complaint, which might be wholly libellous and do untold damage to the individual, and ask for the council's observations on it. Can it be said that the

(1) [1937] 2 K. B. 375.

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council would be justified in publishing that communication from the Minister of Health merely because they were going to consider it at their meeting? They might come to the conclusion that the complaint was absolutely groundless. I can see no ground whatever for saying that the occasion on which this document was published comes within the orbit of the privilege which attaches to the occasions on which documents are published where the person publishing it and the person to whom it is published have a common interest. In my opinion there is no ground for saying that this was a privileged occasion, and, consequently, the appeal succeeds.

du Parcq L.J. I agree. I have nothing to add to the reasons fully set out in the judgments which have been delivered, but I should like to say a few words about a case which was cited to us by Mr. Roberts. That is a decision of the Court of Criminal Appeal to which I was a party: *Rex* v. *Rule* (1). I feel no doubt that that case was correctly decided, and I think also, if I may say so, that the reasons given for the decision were right. It seems to me to be a very long way from deciding anything which can give support to the arguments of the defendants here.

In *Rex* v. *Rule* (1) the court had to assume that the defendant had acted honestly and with a belief in the truth of his statements. He was an inhabitant of Southampton, and according to him he had evidence of gross and criminal misconduct on the part of an important member or important members of the local police force. Nobody can doubt that he had an interest, if not a duty, to communicate such facts, if facts they were, to the Home Secretary. In order to effect the object of acquainting the Home Secretary with those facts, he approached him through the member of Parliament for the division, and the only question before the court was whether it could be said that there was a sufficient interest in the member of Parliament to receive the complaint. The court answered that question in the affirmative. That seems to me to be a result which would not startle anybody, because most people

(1) [1937] 2 K. B. 375.

would say, I imagine, that a constituent was fully entitled to seek the aid of the member representing the division to bring what were alleged to be facts reflecting on the conduct of a public official before the responsible Minister of the Crown. That, and that alone, was decided by that case.

To find an analogy to the present case one would have to assume, if such an assumption might be made without any reflection on members of Parliament, that a member of Parliament who received such information from a constituent were to say: "It is to my interest to show how vigilant I am in all "that concerns my constituency," and to further that interest were to read out to a meeting of electors, the highly defamatory statements which had been handed to him for transmission to the Secretary of State. I cannot imagine any court holding in such a case that a legitimate interest was being furthered or protected by the member of Parliament. There is no support in *Rex* v. *Rule* (1) for the argument of the defendants, and I have only to repeat that I agree entirely with what has been said by the Master of the Rolls and by Goddard L.J.

Appeal allowed: new trial ordered.

Solicitors for plaintiffs: *Pattinson & Brewer.*
Solicitor for defendants: *J. E. Arnold James.*

(1) [1937] 2 K. B. 375.

A. W. G.

CHURCHER *v.* REEVES.

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Nov. 5, 6.

Food and Drugs — Milk — Deficiency of milk-solids — Defence of genuineness—Lack of cattle food—Proof—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 3—*Sale of Milk Regulations,* 1939 (*St. R. & O.* 1939, *No.* 1417), art. 2.

Milk in process of delivery from a farmer to a purchaser was shown to have a deficiency of milk-solids and an excess of water. The farmer asserted that the milk was genuine and that the deficiency was due to scarcity of dairy cake for fodder. Part of the milk was in the dairy unattended for thirteen hours between milking and delivery. The justices dismissed an information against the farmer under s. 3 of the Food and Drugs Act, 1938 :—

Held, that there was evidence on which the justices' decision could be supported notwithstanding the interval of thirteen hours, since the farmer had shown a positive cause to account for the deficiency—namely, the lack of cake—and did not rely solely on non-interference with the milk between milking and delivery to the purchaser.

Jenkins v. *Williams* (1939) 103 J. P. 183 considered and explained.

Case stated by Hove justices.

The appellant, Reginald James Churcher, preferred an information charging the respondent, William James Reeves, junior, with having unlawfully sold to the prejudice of the purchaser at Hove on January 16, 1941, a certain article of food, to wit, milk, which was not of the nature, substance and quality demanded by the purchaser, being deficient in solids not fat to the extent of 6 per cent. of that which it should contain, contrary to s. 3 of the Food and Drugs Act, 1938. (1)

The respondent, at the material date, was under contract to deliver to a dairy the whole of the milk from the cows kept at his farm, he arranging and paying for road transport. On January 16, 1941, the respondent delivered to the purchaser's

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(1) Food and Drugs Act, 1938, s. 3, sub-s. 1 : "If a person sells "to the prejudice of the purchaser "any food or drug which is not of "the nature, or not of the sub-"stance, or not of the quality, of "the food or drug demanded by "the purchaser, he shall . . . . "be guilty of an offence."

Sect. 23, sub-s. 1 : "The "Minister of Agriculture and "Fisheries may make regulations "for determining what deficiency "in any of the normal constituents "of milk, or what proportion of "water, in a sample shall for the "purposes of this Act raise a "presumption, until the contrary

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premises thirty-six and a half gallons of milk in four churns. The appellant, a sampling officer under the Food and Drugs Act, 1938, was present at the purchaser's premises when the churns were unloaded, and immediately took a sample from each of them, the necessary formalities being observed. All the four samples were shown by analysis to be deficient in milk-solids to varying degrees. The average deficiency in the whole thirty-six and a half gallons was 6 per cent., the percentage of milk-solids found being only 7.99 per cent. Evidence was given that it was almost impracticable to abstract solids other than fat from milk and a calculation based on the presumption that the milk was not genuine showed an addition of approximately two and one-fifth gallons of water to make the milk up to thirty-six and a half gallons. Milk had a sensibly constant freezing point lower than that of water and freezing point tests of the samples confirmed the excess of water, the actual amount on the basis of those tests being a little over four gallons.

The milk in question was the product of the bulked afternoon milking on January 15 and of the bulked morning milking on January 16 of fourteen cows. The cows were milked by automatic machine by an employee of the respondent, and were then stripped by hand milking by the respondent. The milk was drawn in open buckets and was then carried by the employee to the dairy, where it was put into a tank, run over a cooler which was not working, through a filter, and placed directly into the churns. The tank was not under constant observation, and the two churns containing the afternoon's milk were left in the dairy from about 5 P.M. until about 6 A.M. next day, when the morning milking began. The product of the afternoon's milking was not measured till the following morning. Lids were placed half on the churns to allow air

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"is proved, that the article sampled is not genuine milk."

By art. 2 of the Milk Regulations, 1939 (St. R. & O. 1939, No. 1417) made by the Minister in pursuance of s. 23, a sample of milk containing less than 8·5 per cent. of solids other than milk-fat is presumed, until the contrary is proved, not to be genuine by reason of the abstraction of solids or the addition of water."

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to enter. After the morning milking the churns containing the bulked milk were labelled and dispatched by lorry to the purchaser. At no time did the respondent or his employee add water to the milk.

During the previous winter the respondent's cows had been fed on hay, kale, roots, and whatever dairy cake was available. Dairy cake was the chief concentrated food for cows, and lack of it, unless it was replaced by some other concentrated food, would tend to reduce the quantity of the milk and the quality might also deteriorate. At the material time the respondent was allowed to buy only 66 per cent. of the quantity of dairy cake bought by him in the year preceding the outbreak of war notwithstanding that he had more cows in milk than in the year before the war. No other concentrate was available.

The justices, being of opinion that the milk was sold by the respondent in the same condition as it was when it was drawn from the cows, dismissed the information.

Geoffrey Lawrence for the appellant. The onus is on the respondent to prove that the milk was as it came from the cow, in other words, that it was genuine milk. Many explanations why milk is not genuine can be put forward, and to exclude the possibility of abstraction from or addition to the milk the respondent must show "a perfectly clear, continuous and exhaustive tracing of the history of the milk": *Jenkins* v. *Williams* (1). In the present case there was a gap of thirteen hours during which the milk was not under observation. Such a gap, on the authority of *Jenkins* v. *Williams* (1) is fatal to the success of the defence. Moreover, the case finds that a freezing point test disclosed that there was over four gallons of excess water in the milk. In the face of that finding it was impossible for the justices to hold that the respondent had proved that it was genuine milk. It is not contested that the milk was deficient, but the explanation offered by the respondent was that the deficiency was due to the restriction of food supplies. If natural causes are alleged to be the cause of deficiency, all other causes must be excluded by the person charged

(1) (1939) 103 J. P. 183, 185.

(*Jenkins* v. *Williams* (1)) and that the respondent has not done. He also referred to *Bowen* v. *Jones* (2); *Hunt* v. *Richardson* (3); and *Kings* v. *Merris* (4).

Dutton Briant for the respondent. There was evidence on which the justices could come to their decision. If there is evidence it is for the justices to decide its weight. The cases on which the appellant relies were decided on their own facts.

VISCOUNT CALDECOTE C.J. [after stating the facts:] It is to be observed that milk which is, as this was, deficient in milk-solids other than milk-fat is to be presumed not to be genuine milk until the contrary is proved, in other words, the question which the justices had to consider before they could find that an offence had been committed was whether the respondent had discharged the onus resting on him of proving that the milk was genuine. If it was genuine, the respondent is entitled to be acquitted of a charge brought against him under s. 3 of the Food and Drugs Act, 1938. That was established by *Hunt* v. *Richardson* (3), the effect of which is aptly and conveniently stated in *Bowen* v. *Jones* (2), where Ridley J. said: "In the case of *Hunt* v. *Richardson* (3) it was held that "the milk was genuine milk as it came from the cows, and that, "although it was proved on analysis that there was a deficiency "in milk fat, the deficiency was due to the manner in which the "cows had been fed. This court held, under the circumstances, "that there had been no offence committed under s. 6 of the "Sale of Food and Drugs Act, 1875" (38 & 39 Vict. c. 63).

Our attention has also been called to *Kings* v. *Merris* (4). In that case the Earl of Reading C.J. made this statement as to the way in which the justices' duty should be discharged: "The "Sale of Milk Regulations merely create a presumption that "the milk in those cases is not genuine, and it is open to the "respondent to rebut it and to show that notwithstanding "the deficiency in non-fatty solids, he has added nothing to or "abstracted nothing from the milk but has sold it in the same "condition as it was when it came from the cow. If evidence

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(1) 103 J. P. 183.
(2) (1917) 117 L. T. 125, 127.
(3) [1916] 2 K. B. 446.
(4) [1920] 3 K. B. 566, 569.

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"were given to that effect and the justices believed it, they "would be justified in finding that no offence had been com-"mitted." I cannot fail to observe that in that passage there is no statement by the Lord Chief Justice that the only evidence which would discharge the onus would be evidence of impossibility of access by any unauthorized person to the place where the milk was kept, coupled with a finding that any person like the farmer who had access to it did not adulterate it. The Lord Chief Justice continues: "Here the difficulty is that as "the case stands there is no evidence to rebut the presumption "created by the regulations. The statement in para. (*j*) of "the case is relied upon as some evidence upon which the justices "were entitled to come to the conclusion that no offence had "been committed. I agree that if there was some evidence "it is not for us to judge of its weight, that being for the "justices."

I approach the matter, therefore, with that statement in my mind as to the parts to be played by the justices and this court. If there is evidence on which the justices can come to the conclusion that the milk is genuine, and they do come to that conclusion, the onus resting on the defendant is discharged. The question in this case is whether there was evidence on which the justices could come to the conclusion that the milk was sold to the purchaser by the respondent in the same condition as it was when it was drawn from the cows. It is said by Mr. Lawrence that the justices were not entitled to arrive at that finding having regard to the evidence which they accept that, according to one test, two and one-fifth gallons of water had been added to the milk, and, according to another test, a little over four gallons had been added. I am not sure that I fully appreciate that evidence or its scientific basis, but the important point for this court to consider is what the actual conclusion of the justices was, and we must confine our attention to the question whether there was any evidence on which they could arrive at their conclusion.

Having considered the whole of the evidence and having listened to the arguments, I have come to the conclusion that there was evidence on which the justices could find as they did. They must be taken to accept the evidence that dairy cake is the normal feed on which milking cows are fed, that lack of dairy cake produces deterioration in the quality of the milk, and that the respondent had only been allowed to buy sixty-six per cent. of the quantity of dairy cake bought by him in the same period before the war, although he had a smaller herd in the pre-war period. When the argument is submitted to us that there is only one possible way in which the genuineness of the milk can be proved, namely, by proving an impossibility of access of any evil-minded persons, I can only say that there is no authority for that proposition, and, apart from authority, it is not one which appeals to me. It seems to me to lay down a standard of proof which goes a great deal further than necessary. The section requires that "the contrary," in other words, that the milk is genuine, be proved, and if the justices hear evidence that there has been inadequate food and accept that evidence and also evidence that lack of dairy cake leads to a deficiency in milk-solids other than fat, I see no reason why, apart from any evidence of non-accessibility, they should not come to the conclusion that the milk was genuine milk.

The difficulty which has been so much present to my mind is the decision in *Jenkins* v. *Williams* (1). Mr. Lawrence puts the effect of that decision so high as to say that the only possible way in which the genuineness of the milk can be proved is by such evidence as was tendered in *Jenkins* v. *Williams* (1). In fact, in *Jenkins* v. *Williams* the court held that the evidence failed to establish the defence there relied on. The Lord Chief Justice expressed the opinion of the court that, if the defence of non-accessibility was relied on, it must be proved up to the hilt, and no doubt that case will be considered and followed by the court when the only defence raised is that nobody could have tampered with the milk. In the present case, however, the substantial defence was that the lack of food prevented the milk from reaching the required standard—a defence which was not raised in *Jenkins* v. *Williams* (1). The justices accepted that and I cannot say that

(1) 103 J. P. 183, 185.

there was no evidence on which they could come to that conclusion.

I must not be supposed to underrate the importance of this regulation, which is intended to provide against the sale of milk lacking in the proper qualities of milk. The court should sift with the greatest possible care any evidence which is given by a respondent to excuse deficiency of fats, whether the defence is that the food was inadequate or not available, or that nobody could have put water in the milk. But in the present case, in view of the decision of the justices based on the evidence before them, I think that this appeal must fail.

HUMPHREYS J. I agree. I desire, first, to consider this matter apart from authority. It appears to me that the onus is clearly on the defendant in such a case as the present to disprove the presumption arising from the facts and conclusions stated in the analyst's certificate that the milk sold was not genuine milk. The defendant, if he is to succeed, must disprove that presumption by proving the contrary, and that must be done by evidence to the satisfaction of the tribunal of fact, which is the court of summary jurisdiction. So far as I am aware, there is nothing in this statute or these regulations to indicate that this question of fact is to be approached in any way differently from any other of the many questions of fact which fall to be decided by courts of summary jurisdiction. The defendant has to satisfy the justices by evidence that the milk in question was in the same state when sold as it was when it came from the cow. It is the duty of the justices to decide whether he has done so. This court can only interfere where it appears that the finding of fact by the justices, whatever it may be, cannot be justified by the evidence before them. I have no doubt that cogent and complete evidence must be before the justices to justify a finding in favour of the defendant where there is, as in the present case, a serious, unexplained, and, perhaps, unexplainable, deficiency in solids other than fats in the milk, pointing to a considerable excess of water. The defendant in such a case must first prove to the satisfaction of the justices that the milk has not been tampered with by himself or by any other person for whose acts he is responsible, but that is not enough. He must further show that no one else has tampered with the milk, and I think the only way of proving that fact is to show that no one else had an opportunity of doing so between the time when the milk was taken from the cow and the time when it was sold by the defendant. The reason why it must be remembered that in these cases the issue is not: "Has the defendant tampered with the milk?" but is: "Has the milk been tampered with?" is that guilty knowledge is not an ingredient in the offence charged against the defendant. The offence consists in the sale of a liquid which is not genuine milk. It may be that the failure on the part of some courts of summary jurisdiction to realize the importance of this consideration has been the cause of the numerous, though apparently unreported, cases referred to by the Lord Chief Justice in his judgment in *Jenkins* v. *Williams* (1) as having been decided by this court. In my opinion, if the evidence called for the defence fails to account for a proved excess of water in the milk, the justices, although accepting that evidence as exculpating the defendant and it may be those persons for whom he is directly responsible, may nevertheless find themselves compelled to hold that the milk was not genuine, and in that event it would be their duty to hold that the offence had been proved, since it is to be emphasized that what the defendant has to prove is not merely that he is not personally responsible, but that the milk which he sold was genuine milk as it came from the cow.

All those matters should be present to the minds of justices who are considering one of these cases, but when all that has been said and emphasized, it remains a question for the justices as the tribunal of fact to decide whether the evidence is so strong as to leave them in no doubt that the genuineness of the milk has been established. For my part I think that this court should not be astute to interfere with such a finding where it is clear that the justices have applied their minds to the true question.

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(1) 103 J. P. 183, 185.

On the facts of the present case, I entirely agree with the conclusion arrived at by the Lord Chief Justice and I concur in the result proposed by him for the reasons stated in his judgment. As I was a member of the court which decided *Jenkins* v. *Williams* (1) I may, perhaps, be permitted to make an observation with regard to that case. I was myself undoubtedly impressed with the information conveyed to me that there were a number of cases which had been decided by this court in the direction indicated by the Lord Chief Justice in the course of his judgment there, that is to say, that there must be a perfectly clear, continuous and exhaustive tracing of the history of the milk from the time of milking up to the moment of sale. The good sense of that statement cannot be disputed. It must be obvious that, if the defendant chooses to base his defence as to the genuineness of the milk on evidence of what was or could have been done to the milk from the time when it came from the cow, that evidence must show that throughout there was no opportunity for anyone else to interfere with it, otherwise the evidence does not prove that which it sets out to prove. As my Lord has observed, that was the only issue raised in that case. In my opinion, that decision cannot be cited as an authority for the proposition that, where the defence is that there are natural causes which account for the apparent excess of water in the milk, nevertheless, there must in addition be given evidence excluding every possibility, however remote, that someone other than the defendant or his servants may have tampered with the milk. *Jenkins* v. *Williams* (1) was not argued on the part of the respondent. If it had been, it may be that counsel who appeared might have satisfied me, as Mr. Dutton Briant has satisfied me in the present case, that there is no line of cases laying down such a proposition to be found in the books, and if there have been cases decided in that way which were not thought worthy of being reported I think it must be because the justices had not applied their minds to the true question :

(1) 103 J. P. 183, 185.

"Is the milk proved to be genuine?" but had decided, as experience shows justices do sometimes decide, what they think is the more important question: "Is it proved that the "defendant has done something which he ought not to have "done?"

In my view, *Jenkins* v. *Williams* (1) should be treated as a decision on the particular facts of the case although in any future case where the same defence is raised as was raised there it would be relevant. Whether in the light of the argument which I have heard in the present case I should have arrived at the same conclusion as that at which I did arrive in *Jenkins* v. *Williams* (1) is a matter of no interest to anyone, and perhaps not even to myself, but I think the decision is one of which it may properly be said that it should be confined to the facts of the particular case.

LEWIS J. I agree. Before this court can upset the decision of the justices we must find that there was no evidence on which they could find as they did. Having read the case and listened to the arguments, I am satisfied that it is impossible to say that there was no evidence on which they could so find. There was some evidence, and, therefore, this court cannot upset their decision. Speaking for myself, I do not think that *Jenkins* v. *Williams* (1) decided, or was intended to decide, the general principle which Mr. Lawrence has argued. I think it is a decision on the facts of that case, bearing in mind the method by which the defendant there sought to prove his defence.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for W. Jermyn Harrison, Town Clerk, Hove.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth, for Graham Hooper & Betteridge, Brighton.*

(1) 103 J. P. 183, 185.

J. W. H.

ARTNERS LTD. [1950] 1 All E.R. 581.

C. A.
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Dec. 1.

MONK *v.* REDWING AIRCRAFT COMPANY, LIMITED.

Practice—Pleading—Statement of claim—Master and servant—Wrongful dismissal—Claim for special damages—Further and better particulars—Period of reasonable notice—Other employment—Particulars before delivery of defence—R. S. C., Order XIX., *r.* 7B.

In an action for wrongful dismissal where the contract of service did not state the length of notice required to terminate it, the defendants applied before defence for particulars of (1.) the period of time claimed by the plaintiff to constitute a reasonable notice, and (2.) the special damage alleged, stating whether during the period alleged to constitute reasonable notice "he obtained "other employment or employments and if so (*a*) when, (*b*) with "whom, (*c*) date of commencement, (*d*) salary and terms of pay-"ment, (*e*) the nature thereof, and (*f*) whether any such employ-"ment is still continuing and, if not, when it determined."

Held (reversing Asquith J.), that, as the special damages were the excess of the amount which the plaintiff would have earned if he had not been dismissed without reasonable notice over the amount (if any) which he had earned in other employment during the period of reasonable notice, the defendants were entitled to the further and better particulars asked for other than the "terms "of payment" in, and "the nature" of, that other employment, and that it was a proper case for the court to exercise its discretion under R. S. C., Order XIX., r. 7B, by making the order asked for before delivery of defence so as to enable the defendants to decide whether they would make any, and, if so, what, payment into court.

APPEAL from Asquith J.

In June, 1940, the plaintiff was employed by the defendants as works manager at a salary of 650*l.* a year, but the contract of service did not specify what period of notice was required to terminate it. On June 14, 1940, the defendants dismissed the plaintiff without notice, and he began proceedings to recover arrears of salary which, he alleged, were due to him, and damages for breach of contract. By para. 5 of the statement of claim he pleaded that it was at all material times an implied term of his employment that it should only be determined by reasonable notice, and, by para. 8: "In breach "of the said term of the plaintiff's employment by a letter "dated June 14, 1940, the defendants without giving the "plaintiff reasonable notice dismissed him from his said

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"employment whereby the plaintiff has suffered damage in that "he has lost the salary which he would otherwise have received." Before delivery of defence, the defendants' solicitors wrote to the plaintiff's solicitors asking for further and better particulars of the statement of claim, including particulars of the term of the employment referred to in para. 8, and, in connection with the claim for damages, whether the plaintiff had obtained any, and, if so, what, employment since his dismissal, specifying a number of matters with regard to any such employment. The only reply given was that the term referred to in para. 8 was the term pleaded in para. 5. The defendants took out a summons asking for an order that the plaintiff should deliver the following further and better particulars: "Under paras. 5 and 8: of the period of time "claimed by the plaintiff to constitute a reasonable notice; "under para. 8: of the special damage alleged, stating whether "during the period which the plaintiff claims to constitute "reasonable notice he obtained other employment or employ-"ments, and, if so, (*a*) when, (*b*) with whom, he obtained "such employment, (*c*) date of commencement, (*d*) salary and "terms of payment, (*e*) the nature of the employment, and "(*f*) whether any such employment is still continuing and, if "not, the date when it was determined." The master dismissed the summons and his decision was confirmed by Asquith J. The defendants appealed.

G. O. Slade for the defendants. In view of the plaintiff's delay in bringing the action he must have known, whether on the true view reasonable notice was three, six, or twelve months, what amount he had earned elsewhere during that time. The defendants think that he was in other employment and, in order to make a payment into court, as they desire to do, it is necessary for them to know his earnings. After delivery of defence the defendants would be free to interrogate on this subject, but by obtaining the particulars before delivery of defence much expense may be saved. Moreover, if it can be shown that the plaintiff earned more than the wages he lost by his dismissal without notice, the plaintiff's cause of action is gone: *Reid* v. *Explosives Co.* (1). Further, the defendants are entitled to these particulars as particulars of unliquidated special damage, and it is well settled that the damages in such a case as this are the difference between what the plaintiff would have earned if reasonable notice of dismissal had been given to him, and the amount actually earned by him in the same period in other employment. Bullen and Leake's Precedents of Pleading, 3rd ed., p. 223, shows that the length of reasonable notice used to be pleaded, although that is omitted in the 9th ed., p. 252. It is not suggested that the plaintiff was bound to state the length of reasonable notice in para. 5, but on the question of the amount of the special damages claimed the defendants are entitled to full particulars. It used to be possible to obtain the particulars now asked for on interrogatories before plea: *Wright* v. *Goodlake* (2), but, as under the present day practice interrogatories are only allowed after pleading, the court ought to allow the information to be obtained by way of particulars: see *Milbank* v. *Milbank* (3). It is clear from R. S. C., Order XIX., r. 7B (4), that the court has a discretion and it is the ordinary practice to order particulars when a defendant wishes to make a payment into court. Payment into court is a form of defence and until comparatively recently it used to be pleaded.

Gerald Gardiner for the plaintiff. Particulars which are not necessary to enable a defendant to plead ought not to be given before delivery of defence: see R. S. C., Order XIX., r. 7B. The practice of allowing particulars before delivery of defence was stopped because in running down cases where the defendant is generally insured and the plaintiff often a poor person, the defendant applied for the most minute particulars of special damage and so increased the costs unduly. A payment into court is not a matter of pleading except in a case of tender.

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(1) (1887) 19 Q. B. D. 264.

(2) (1865) 3 H. & C. 540.

(3) [1900] 1 Ch. 376, 385.

(4) Order XIX., r. 7B, provides: "Particulars of a claim shall not "be ordered under r. 7 to be "delivered before defence unless "the court or judge shall be of "opinion that they are necessary "or desirable to enable the defend-"ant to plead or ought for any "other special reason to be so "delivered."

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It is only after the question of liability and the quantum of damages have been determined by the court that payment in can be referred to. In the present case there has been no admission of wrongful dismissal and no suggestion was made in the letters passing between the solicitors that payment into court was intended. Further, the plaintiff has not alleged that he has earned anything from any other employer, and a defendant is not entitled to particulars of something which is not pleaded. The plaintiff would not object to giving particulars of the special damage and how it is made up and that is the most the defendants are entitled to.

Slade replied.

Lord Greene M.R. [after stating the facts :] The contract on which the plaintiff sues admittedly did not provide for any particular length of notice, and, therefore, reasonable notice was required before it could be properly determined. In his statement of claim the plaintiff claims "under para. 8, "damages." It is to be observed that the damage suffered under that head is in its nature special damage, and, in accordance with the ordinary rule, where a plaintiff is alleging special damage he must give sufficient particulars of it. Mr. Gardiner maintains that the plaintiff, in his statement of claim, has sufficiently particularized his alleged damage by saying that he has lost the salary which he would otherwise have received. I must confess that I cannot extract from the statement of claim any sufficiently clear statement whether the measure of the damage alleged is the full salary which the plaintiff would otherwise have received, or whether it is to be ascertained by deducting from the salary which he would have received if he had not been wrongfully dismissed sums which he received in some other employment.

It is to be noticed that there is very often to be found an inaccurate use of language in connection with damage of this character. It is not true to say, although it may be convenient, that what must be done is to take the salary which the plaintiff would have earned and give credit for what he has in fact earned in some other employment. What the plaintiff claims in a case such as this is damages and not a salary. The plaintiff's salary in the employment from which he has been dismissed is really one element in ascertaining what the just measure of damage is, and another element is the salary which he earned in another employment, but what is claimed is damages and not, so to speak, the balance of an account. It is, therefore, misleading to use such phrases as "give credit for" and "bring into account," although there is no particular harm in them if it is realized that they are not used in a strict sense.

What, then, is the position of a plaintiff who claims damages in a case such as this? It seems to me that he must specify what it is that he claims, and in every statement of what he claims by way of special damages there is necessarily implicit one of two allegations, either that he has not earned any remuneration in other employment during the relevant period, or that he has done so, and any form of pleading or any particulars given which do not bring to the clear knowledge of the defendant which of those two implicit statements he is going to rely on is, in my judgment, embarrassing. The function of particulars in such a case is to bring out clearly by express language which of those allegations is relied on and, if it be the latter, sufficient details showing how the figure is arrived at should be given in the particulars. I cannot accept the view which Mr. Gardiner presented that in a pleading in this form he is entitled to stand on the language used and to refuse to elaborate what he is alleging his damage to be. As I have said, I am unable to ascertain whether the plaintiff is saying: "I earned nothing," or "I earned something "which I do not specify." In those circumstances the defendants ask for particulars stating whether the plaintiff obtained any other employment and, if so, (*a*) when; (*b*) with whom; (*c*) date of commencement of service; (*d*) salary and terms of payment; (*e*) nature of employment; (*f*) whether such contract still exists, and, if not, when it terminated. Having regard to the form of the pleading in this case, it seems to me that the defendants are entitled to particulars substantially in that form to enable them to know what the plaintiff's real claim for damages is.

The next question, really a subsidiary one, arises out of another claim of the defendants for particulars, namely, of the period of time claimed by the plaintiff to constitute a reasonable notice. It will be observed that, if the plaintiff gives the particulars which, in my opinion, the defendants are entitled to under para. 8, there will be implicit in the figures which he gives an allegation of what he is going at the trial to allege is a reasonable time. He may think it right to give the particulars under para. 8 in several alternative forms, reflecting alternative views which he proposes to put forward at the trial as to what is a reasonable time, but it seems to me that it would be inconvenient to put on the defendants the burden of unravelling the figures and calculations given, and that, in order that the whole meaning of the claim as particularized may be brought to light, they are entitled to the particulars for which they ask in respect of reasonable notice. Therefore, on principle, I come to the conclusion that these particulars of this pleading ought to be given.

Another point arises. Particulars are being asked for before delivery of defence. It is pointed out by Mr. Slade that, unless these particulars are ordered now the defendants will not be able to exercise their right to pay money into court until a considerably later stage in the action when expense has been incurred and interrogatories have been administered or particulars obtained. He says that he ought not to be put to expense of that kind when, if the claim had been properly particularized in the first instance, he would have been able to make up his mind whether he would pay money into court, and, if so, what sum. It is said by Mr. Gardiner that the case is one in which no order ought to be made under r. 7B. In my judgment, the discretion which that rule gives ought to be exercised in this case. It seems to me that when a question of payment into court arises, as it does here, it must be remembered that such a payment is a plea. It used to be pleaded although under the present rules it must not be pleaded. Nevertheless its essential nature is the same, and

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it is a plea, although, so to speak, a secret plea. It always was a secret plea so far as the jury were concerned. It is now a secret plea so far as the judge is concerned. Nevertheless, it remains a plea. In my view, the delivery of these particulars is necessary or desirable to enable these defendants to plead, because, unless they have them, they are not getting the necessary particulars to enable them to decide whether they will pay money into court and, if so, what amount. Even if that were not the true view, I think that there is, in this case, a special reason why particulars should be ordered at this stage.

That disposes of all the matters in the appeal save two small points on the particulars claimed under para. 8. Mr. Slade does not press for the particulars of terms of payment or nature of employment. That being so, the order which the court will make will be for particulars of the reasonable notice, and of those claimed under para. 8 with the modification I have mentioned.

Before leaving the matter I should say that Asquith J. refused to interfere with the master's order in the belief that there was some rule of practice tying his hands which, I understand, he conceived to exist in relation to ordering particulars of special damage in cases of this kind, not to the other question, namely, the ordering of particulars before defence. He said that, if no such rule of practice had existed, he would have made the order. In my opinion, there is no such rule of practice, and it is right, perhaps, to make the general observation that the Rules of Court when they confer a discretion on a judge give it in accordance with their language. Rules of practice, it is true, grow up and justify themselves as indicating that in the ordinary case judicial discretion will not be exercised in a particular way, but no such rule of practice can be binding where complete discretion is given, and if a judge considers that an order should be made in the special circumstances of the case before him, he is certainly not bound to follow rules of practice of that kind. The result is that the appeal will be allowed and an order made in the terms that I have indicated.

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MACKINNON L.J. I agree.

CLAUSON L.J. I also agree.

Appeal allowed.

Solicitors for defendants: *R. C. Bartlett & Co.*
Solicitors for plaintiff: *Ashby, Rogers & Fournier.*

H. C. G.

HUME PIPE AND CONCRETE CONSTRUCTION COMPANY, LIMITED *v.* MORACRETE, LIMITED.

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Nov. 17.

Practice—Writ—Service—Out of the jurisdiction—"Ireland"—Exclusion of Eire—Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (*St. R. & O.* 1923, *No.* 405), *r.* 2; *R. S. C., Order* XI., *rr.* 1 (*e.*) (*iii*), 2, 4, 6.

Where leave is given under R. S. C., Order XI., r. 1, for service of a writ out of the jurisdiction on a defendant domiciled or ordinarily resident in Eire, the writ itself is to be served, and not notice of the writ under r. 6, since Eire is a British possession and its citizens are British subjects. But since the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, "Ireland" in the R. S. C. must be construed as meaning Northern Ireland only, and, therefore, the special provisions of Order XI., r. 2, with regard to service in Scotland or Ireland do not apply to service in Eire.

APPEAL from Lewis J. in chambers.

The plaintiffs, Hume Pipe and Concrete Construction Co., Ld., a company registered and carrying on business in England, entered into a contract, which was in terms to be governed by English law, with the defendants, Moracrete, Ld., a company registered and carrying on business in Dublin. The plaintiffs began an action in England in which they alleged breaches of the contract, and Master Simner made an order for service of the writ out of the jurisdiction under Order XI., r. 1 (*e.*) (iii)

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of the Rules of the Supreme Court (1). The defendants applied to Master Jelf who set aside the service as irregular, on the ground that notice of the writ, and not the writ itself, should have been served, under r. 6. The defendants also contended that by virtue of r. 2 the court was bound to consider the relative convenience of trial in London or Dublin, and that the balance of convenience was in favour of Dublin. Lewis J. reversed the order of Master Jelf, but gave leave to appeal.

Fortune for the defendants, relied on *Wakely* v. *Triumph Cycle Co., Ld.* (2), as supporting the proposition that notice of the writ, and not the writ itself should have been served. In that case it was held that a plaintiff residing in Southern Ireland was in the position of a foreigner when he sued in the English courts, and must give security for costs, since the Judgment Extension Act, 1868, ceased to operate in Southern Ireland on December 5, 1922. An Irish defendant was also a foreigner for the purpose of service, and notice of the writ only should have been served. "Ireland" in r. 2 should be given its natural geographical meaning, and on the facts, having regard to war-time restrictions on travel from Eire to England, Dublin was the more convenient forum.

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(1) R. S. C., Order XI., r. 1: "Service out of the jurisdiction of "a writ of summons or notice of a "writ of summons may be allowed "by the court or a judge when-"ever . . . . (*e*.) The action is one "brought against a defendant "not domiciled or ordinarily "resident in Scotland to enforce, "rescind, dissolve, annul or other-"wise affect a contract or to "recover damages or other relief "for or in respect of the breach "of a contract— . . . . (iii) by "its terms or by implication to "be governed by English law."

Rule 2: "Where leave is "asked from the court or a judge "to serve a writ, under the last "preceding rule, in Scotland or in "Ireland, if it shall appear to the "court or judge that there may be "a concurrent remedy in Scotland "or Ireland (as the case may be), "the court or judge shall have "regard to the comparative cost "and convenience of proceeding "in England, or in the place of "residence of the defendant . . . ."

Rule 4: " . . . . No such leave "shall be granted unless it shall "be made sufficiently to appear "to the court or judge that the "case is a proper one for service "out of the jurisdiction under "this Order."

Rule 6: "When the defendant "is neither a British subject "nor in British Dominions, notice "of the writ, and not the writ "itself, is to be served on him."

(2) [1924] 1 K. B. 214.

Lloyd-Jones for the plaintiffs. Since the establishment of the Irish Free State, " Ireland " in r. 2 must be limited to Northern Ireland. That seems to follow directly from the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (1). The Rules of the Supreme Court, made under statutory authority are " enactments," and, therefore, " Ireland " in those rules now excludes Eire. That view is taken in Dicey's Conflict of Laws, 5th ed., p. 241, but Eire is none the less a part of the British Empire and r. 6 has no application. The writ was rightly served.

MACKINNON L.J. The original point taken before Master Jelf was that service of the writ, which was prima facie right under Order XI., r. 1 (*e*.) (iii), was irregular, because it ought to have been service of notice of the writ under Order XI., r. 6, and not of the writ itself. That is a bad point. The defendants are a British company in a British dominion—Eire—and, therefore, the writ itself, not notice of the writ, was to be served on them. Accordingly, Lewis J. was right in allowing the appeal from Master Jelf on that ground.

Apart from that point, however, Mr. Fortune relied on Order XI., r. 2, and argued that under that rule it was the duty of the court to have regard to the convenience of the parties, and that in the present case litigation in Dublin would be more convenient than in England. In my view, r. 2 does not apply to this case, because the defendants are incorporated and carry on business in Dublin which is not in " Ireland " within the meaning of the rule. Goddard L.J. has pointed

(1) Irish Free State (Consequential Adaptation of Enactments) Order, 1923, art. 2: " Subject to the provisions of this " Order and of any subsequent " Order in Council made under " s. 6 of the Irish Free State " (Consequential Provisions) Act, " 1922, references in any enact" ment passed before the establish" ment of the Irish Free State " to . . . . ' Ireland ' shall, in the " application of the enactment to " any part of Great Britain and " Ireland other than the Irish " Free State, be construed as " exclusive of the Irish Free " State."

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MacKinnon L.J.

out that under the Irish Free State (Consequential Adaptation of Enactments) Order: " Any reference in any enactment ". . . . to 'Ireland' shall be construed as exclusive of the "Irish Free State." Therefore, the word " Ireland " in the rule has not applied to Dublin since the establishment of the Irish Free State.

Quite apart from that, the court has inherent jurisdiction under r. 4 to correct an abuse of the process of the court by the parties where it is clear that they ought to have litigated elsewhere. *Logan* v. *Bank of Scotland* (1) is the leading authority for the proposition that, for leave to serve a writ out of the jurisdiction to be refused, it must be established that it is an abuse of process to bring the defendant before an English court. Nothing of the sort can possibly be alleged in this case. All that can be said is that, although it would be highly convenient for the plaintiffs to have their action tried here, there may be some inconvenience to the defendants. That is far short of anything like a vexatious proceeding, still less an abuse of the process of the court.

GODDARD L.J. I agree. Some confusion seems to exist with regard to the rules dealing with service of writs out of the jurisdiction in cases of breach of contract. When r. 2, of Order XI., is relied on we have to consider the meaning of "Ireland." Apart from legislation, I should be inclined to hold, on a priori grounds, that " Ireland " must now be construed as meaning " Northern Ireland." So long as Ireland was a part of the United Kingdom, there was good reason for treating the Irish courts in the same way as we were treating the courts of Scotland. It was considered that an action which was brought against a person within the jurisdiction of His Majesty's courts in the United Kingdom should be tried where the defendant was resident. But now that Eire is no longer a part of the United Kingdom that reasoning does not apply, and it is difficult to see why a defendant in Eire should be in any different position from that of a British subject resident in Canada, Australia or South

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(1) [1904] 2 K. B. 495.

Africa. I think, however, that the matter is put beyond controversy by the Irish Free State (Consequential Adaptation of Enactments) Order, 1923. The rules of court which are made under the provisions of the Judicature Acts, have the force of statutes, and can properly be described as "enact-"ments." It is true that the court can inquire into the validity of a rule, but, subject to that, the rules made are part of the Judicature Acts. In my view, the Rules of the Supreme Court are clearly an "enactment" within the meaning of the Order. This view is taken in Dicey's Conflict of Laws, 5th ed., p. 241, a work of very high authority.

On the question whether or not any case has been made out for the court, in its discretion, to refuse leave on the balance of convenience, I have nothing to add to what my Lord has said. I agree that the appeal should be dismissed.

Hallett J. I agree.

Appeal dismissed.

Solicitors for appellants: *Crossman, Block & Co.*
Solicitors for respondents: *Last, Riches & Fitton.*

J. W. H.

OWENS *v.* MINOPRIO.

1941
Dec. 2.

Justices—Summary jurisdiction—Information defective because not laid by authorized person—Withdrawal of summons—Second information for same offence—Jurisdiction to hear second summons—Autrefois acquit.

An information was laid against the respondent for failing to comply with a billeting notice by a person who was not authorized to institute the proceedings. A second information was, therefore, laid against the respondent for the same offence by an authorized police officer who applied to the justices for the withdrawal of the summons issued in respect of the first information. On the hearing of the second information the respondent contended that he had been put in peril on the first summons and could not be put in peril again for the same offence, and the justices on that ground dismissed the second information :—

Held, that, owing to the technical informality in the first proceedings, the respondent had not been put in peril and the justices ought, therefore, to have heard the second information.

Where the withdrawal of a summons has been, not on the merits of the case, but on a preliminary point, the withdrawal is not equivalent to a dismissal or an acquittal. The statement in *Pickavance* v. *Pickavance* [1901] P. 60, at p. 63, that the withdrawal of a summons puts an end to the complaint was obiter dictum and not the ground of the decision, and that case is no authority for the statement in Stone's Justices' Manual, 72nd ed., p. 184.

Davis v. *Morton* [1913] 2 K. B. 479, applied.

CASE stated by Caernarvonshire justices.

At a court of summary jurisdiction sitting at Pwllheli an information was preferred on May 9, 1941, by one Robert Gwilym Roberts against the respondent, Frank C. Minoprio, returnable for a court to be held on May 14, for having failed to comply with the requirements of a billeting notice calling on him to provide certain children with board and lodging, contrary to the Defence (General) Regulations, 1939, reg. 22. At the request of the respondent, the information was adjourned to a court to be held on May 28. On May 16, a second information in respect of the before mentioned offence was laid by the appellant, Owen John Owens, superintendent of police for the division of Pwllheli, and that information came before the justices on May 28. Immediately preceding the hearing of the second information on May 28, an application was made by the appellant in the presence of the respondent for the withdrawal of the summons issued in respect of the first information on the grounds (1.) that Robert Gwilym Roberts, who laid the first information, was not a person authorized to institute legal proceedings in accordance with reg. 93 (1.) of the Defence (General) Regulations, 1939 ; and (2.) that, to rectify this technical informality, the appellant laid the second information. When the case for the appellant on the second information was about to be opened, the respondent contended that (*a*) the withdrawal of the first summons amounted to a dismissal of the complaint ; and (*b*) the respondent had been put in peril on being served with the first summons and could not, therefore, be put in peril a second time for the same offence. In support of his contention he referred to *Pickavance* v. *Pickavance* (1) and *Reg.* v. *Brakenridge* (2). Without hearing evidence the justices upheld the respondent's objection and dismissed the second information. At the request of the appellant they stated a case for the opinion of the court in which they said that they had been of opinion that the decision in *Pickavance* v. *Pickavance* (1) should be followed in this case and that it was on that ground that they had dismissed the second information. Had their attention been called to *Davis* v. *Morton* (3) they would have ordered that the case be proceeded with.

Valentine Holmes for the appellant. The justices were wrong in dismissing the second information on the ground that the respondent had been put in peril on being served with the first summons. That contention was based on a dictum of Sir Francis Jeune P. in *Pickavance* v. *Pickavance* (4) that "the effect of the withdrawal of the summons in this case "was to put an end to the complaint; and the first summons "having been withdrawn, that it would not be practicable to "found a fresh summons upon the same complaint." Later the President said (5): "The court, having once given its "consent to the withdrawal, cannot be competent to revive "it again by issuing a fresh summons on the same ground." Those dicta were obiter, because, as the President had previously pointed out, it was not necessary to go so far as that as the second complaint was out of time. The statement in *Pickavance* v. *Pickavance* (4) that the withdrawal of a summons put an end to the complaint was dissented from by Palles C.B. in *Rex* (*McDonnell*) v. *Tyrone Justices* (6), and in *Davis* v. *Morton* (3) it was held not to apply where the withdrawal is not on the merits of the case but, as in the present case, is owing to a technical informality in the proceedings on the hearing of the complaint. Where a man has been

(1) [1901] P. 60.
(2) (1884) 48 J. P. 293.
(3) [1913] 2 K. B. 479.
(4) [1901] P. 60, 63.
(5) Ibid. 64.
(6) [1912] 2 I. R. 44.

put in peril for an offence he cannot be put in peril again for the same offence, but the respondent in this case was never put in peril by the first summons as the person who laid the first information was not authorized to institute legal proceedings and, therefore, the proceedings were a nullity.

The respondent did not appear and was not represented.

VISCOUNT CALDECOTE C.J. In my opinion, the justices came to a wrong decision. Indeed, in the special case on which the appeal arises, it is stated that, if their attention had been called to *Davis* v. *Morton* (1), they would not have arrived at the result at which they did. The justices acceded to an objection to the proceedings taken by the respondent and based on the contention that he had already been put in peril by the summons which had been withdrawn, and they did so under the impression (which they seem now to agree was mistaken) that they were required to do so by the decision of the Divisional Court in *Pickavance* v. *Pickavance* (2).

The headnote to that case, as reported in the Law Reports, says: "The withdrawal of a summons under the Summary "Jurisdiction (Married Women) Act, 1895, has the effect of "putting an end to the complaint in respect of which it is "issued, and, after the withdrawal, no fresh summons can be "issued upon the same cause of complaint." In that case an information had been preferred by a wife against her husband for cruelty and a separation order was asked for. Before that information had been laid, two similar informations had been sworn by the wife and subsequently withdrawn, the second of those informations, like the information which was actually before the Divisional Court, being out of time as it had not been laid within six months from the date when the subject-matter of the complaint arose. Sir Francis Jeune P., in giving judgment (3), said that the case involved the principle "whether the withdrawal of a summons amounted "to a complete withdrawal of the complaint, so that it could

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(1) [1913] 2 K. B. 479.
(2) [1901] P. 60.
(3) [1901] P. 63.

"not be proceeded upon." Having said that there was no direct authority on the point, he stated that he was clearly of opinion "that the effect of the withdrawal of the summons "in this case was to put an end to the complaint," but he went on to say that it was not necessary to go so far as that because the complaint which was before them was out of time and that was a sufficient ground on which to dismiss the appeal. It is quite true that the learned President, having expressed that opinion, later said that "the withdrawal of "the summons can only take place by leave of the justices or "magistrate," and that a complaint having been withdrawn, it was not possible to prefer another complaint arising out of the same circumstances. In the view which I have formed, those statements by the learned President, although coming from a judge of great authority, are not an actual decision to the effect stated in the headnote. They are no more than an expression of the learned President's opinion on a point which it was not necessary to decide. That decision seems to me not to be an authority for the proposition stated in the headnote of the report and also in text-books, particularly in Stone's Justices' Manual, 72nd ed., p. 184.

Pickavance v. *Pickavance* (1) has been commented on, and, in so far as it purports to decide the proposition stated in the headnote, it seems to have been disapproved of, in two cases, one an Irish case, *Rex* (*McDonnell*) v. *Tyrone Justices* (2), before a Divisional Court over which Palles C.B. presided, and the other, *Davis* v. *Morton* (3). Those are actual decisions that when a withdrawal of a summons is permitted by justices, not on the merits of the case, but on a preliminary point, the withdrawal is not equivalent to a dismissal or an acquittal. That is so stated by Pickford J. in his judgment in *Davis* v. *Morton* (4).

The basic principle of the plea autrefois acquit is that the person charged has already been put in peril, and no man is to be put in peril twice in respect of the one charge. In the present case there was no withdrawal of the first summons on the merits. There was a withdrawal, with the consent of

(1) [1901] P. 60.
(2) [1912] 2 I. R. 44.
(3) [1913] 2 K. B. 479.
(4) Ibid. 486.

the justices, in consequence of an informality in the proceedings. To correct that informality a second information was laid by a different person. In my judgment, the justices should have proceeded to hear that second summons.

I may add that I think it is highly desirable that *Pickavance* v. *Pickavance* (1) should no longer appear in the text-books as an authority to the effect stated by the justices in their first decision, and that it should be appreciated that the only decision in the case was that the information was out of time. I think that this case should be remitted to the justices with an expression of our opinion to that effect.

HILBERY J. I concur.

ASQUITH J. I concur.

Case remitted.

Solicitors for appellant: *Evan Davies & Co., for Evan R. Davies & Davies, Pwllheli.*

R. F. S.

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(1) [1901] P. 60.

1941
Nov. 11.

SWINDON CORPORATION *v.* HERBERT AND OTHERS.

Police—House to house collections—Licence by police authority—Non-county borough—Borough police force consolidated with county police force—" Police authority "—Watch committee of borough or standing joint committee of county—Police Pensions Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 31), *s.* 30, *Sch. III.—House to House Collections Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 44), *s.* 2, *sub-s.* 1; *s.* 11, *sub-s.* 1.

Where the corporation of a non-county borough has made an agreement under the County Police Act, 1840 (3 & 4 Vict. c. 88), with the standing joint committee of the quarter sessions and the county council of the county in which the borough is situated by which the borough police force is consolidated with the county police force, the police authority, which is empowered by s. 2 of the House to House Collections Act, 1939, to grant a licence for the holding of house to house collections for a charitable purpose within the borough, is not the watch committee of the borough but the standing joint committee of the county.

SUMMONS taken out by the plaintiffs, the corporation of the borough of Swindon, against the defendants, the standing joint committee of the quarter sessions and the county council of Wiltshire, to determine whether the corporation or the joint committee was the police authority to exercise within the borough certain powers contained in the House to House Collections Act, 1939 (1).

In July, 1902, the corporation of Swindon, a non-county borough, entered into an agreement under the County Police Act, 1840, with the standing joint committee of the quarter sessions and the county council of Wiltshire which, after reciting that it had "been arranged between the county authority "and the borough authority that the police establishment

(1) By House to House Collections Act, 1939, s. 2, sub-s. 1: "Where a person who is promoting, or proposes to promote, a "collection in any locality for a "charitable purpose makes to the "police authority for the police "area comprising that locality an "application in the prescribed "manner . . . . and furnishes "them with the prescribed information, the authority shall, "subject to the following provisions of this section, grant to "him a licence authorising him to "promote a collection within that "locality for that purpose."

By sub-s. 3, a police authority may refuse to grant a licence, or, in certain circumstances may revoke it.

By s. 11, sub-s. 1: "In this "Act the following expressions "have the meanings hereby respectively assigned to them . . . . "'police area,' 'police authority' "and 'chief officer of police,' "have the same meanings respectively as in the Police "Pensions Act, 1921."

By Police Pensions Act, 1921, s. 30: "In this Act, unless the "context otherwise requires—The "expression 'police area' means "one of the areas set forth in the "first column of the Third "Schedule to this Act; and the "expressions 'police authority,' "'chief officer of police' and "'police fund,' mean, as respects "each police area, the authority, "officer, and fund, respectively "mentioned opposite to that area "in the second, third, and fourth "columns of that schedule."

In the third schedule to the Act the police authority for a county is stated to be "the standing "joint committee of the quarter "sessions and the county council"; the chief officer of police, "the chief constable"; and the police fund, "the county fund." The police authority for a borough is stated to be "the "watch committee"; the chief officer of police, "the chief constable"; and the police fund, the "borough fund or borough "rate or any fund or rate applicable under any local Act for the "expenses of the police force." The schedule also contains these words: "In this Schedule the "expression 'county' means an "administrative county within "the meaning of the Local "Government Act, 1888, but "does not include a county "borough."

"of the said county and borough shall be consolidated," provided: "The police establishment of the said county and "the police establishment of the said borough shall be consolidated into one police establishment, provided that the "chief constable for the time being of the said county shall "have the same power in respect of the appointment, promotion and dismissal of constables and otherwise in regard "to the general disposition, employment and government of "the said consolidated police establishment whether within "or beyond the limits of the said borough as he has heretofore "had in regard to the county police establishment and that he "shall not be under any obligation to present any report to "the borough authority." The agreement also provided that the county authority should maintain a police establishment of a certain strength within the borough, and that the borough authority should during the continuance of the agreement pay to the treasurer of the county "the yearly sum of 1900*l*. by "equal quarterly payments" on certain dates to provide their proportion of the cost of the consolidated police force.

Montgomery K.C., *Erskine Simes* and *Squibb* for the plantiffs. The result of the County Police Act, 1840, and the agreement made under it in July, 1902, is that the standing joint committee have to carry out the duties which would otherwise fall on the watch committee, but that does not mean that a different meaning must be given to the expression "police "authority" from that given to it by the definition in the third schedule to the Police Pensions Act, 1921. That Act is now carried out in the borough of Swindon by the standing joint committee, but it does not follow that the word "borough" has, for the present purpose, to have a different meaning placed on it from that in which it is used in the Act of 1921. The watch committee of the borough still deal with functions which are not covered by the agreement. They determine the number of constables required in the borough, and also whether the agreement ought to be amended. The Act of 1840 in certain circumstances puts a limitation on the powers of the watch committee, but that does not mean that a different meaning must be given to the word "borough" from that which it bears in the Act of 1921. In the present case the meaning of the word as used in that Act applies, and the "police authority" is as stated in the Act, namely, the watch committee of the borough.

Turner K.C. and *Valentine Holmes* for the defendants. The Act of 1939 says that the expression "police authority" is to have the same meaning as in the Act of 1921. Atkinson J. said in *Rex* v. *National Arbitration Tribunal. Ex parte Bolton Corporation* (1) that "the fundamental rule of interpretation "to which all others are subordinate is that a statute is to be "expounded according to the intent of them that made it." Where there has been a consolidation of a borough police force with the county police force by virtue of an agreement made under the Act of 1840 there is only one police force. The definition of "police authority" given in s. 30 of the Act of 1921 is, as is there stated, "unless the context otherwise "requires." When the Act of 1921 is examined in detail it is clear that the expression "police authority" cannot mean the watch committee in the case of a borough where the borough police force has been consolidated with the county police force. The expression must mean the authority which has control of the police force. By s. 100 of the Local Government Act, 1888, "the expression 'administrative county' "means the area for which a county council is elected in "pursuance of this Act, but does not (except where expressly "mentioned) include a county borough." It, therefore, includes a non-county borough. Having regard to the provisions of the Act of 1921, the "police authority" under the Act of 1939 is, in the case of the borough of Swindon, the standing joint committee of the county.

ATKINSON J. [stated the facts and continued:] Under the agreement of July, 1902, the borough of Swindon parted completely with its police force, and became a borough which had no police force of its own. [The learned judge then stated how the question in issue arose on the construction of the House to House Collections Act, 1939, s. 11, and the Police Pensions Act, 1921, s. 30 and Sch. III., and continued :] An administrative county within the meaning of the Local Government Act, 1888, includes, or at any rate may include, a non-county borough. Therefore, the expression "a county" in the schedule to the Act of 1921 is wide enough to cover a non-county borough such as Swindon.

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(1) [1941] 1 K. B. 584, 600.

The argument for the plaintiffs is that Swindon is a borough and by the Police Pensions Act, 1921, Sch. III., the police authority for a borough is the watch committee. It is said that that is conclusive of the question, but the definition in the schedule is subject to the context and, therefore, one must look at the Act of 1921 as a whole to see what the expression "police authority" means in relation to a borough which has parted with the control of its police force.

Mr. Turner, on behalf of the defendants, has gone through the Act of 1921 section by section, and he has satisfied me that under that Act the police authority for a borough which has entered into such an agreement as that entered into by the corporation of Swindon cannot be the watch committee but must be the standing joint committee of the quarter sessions and the county council. If I am right about that, there is an end to the argument. I might go through the Act as Mr. Turner did, but it is necessary to refer to only two or three sections by way of example. Sect. 2, sub-s. 1, says, for instance, that "every member of a police force if "he has completed 25 years' approved service, and has given "three months' written notice, or such shorter notice as the "police authority may accept . . . . shall be entitled . . . . to "retire and receive an ordinary pension for life." It is idle to suggest that a constable employed by the county satisfies that provision by giving a three months' written notice to the watch committee of a borough with whom he has nothing to do and to whom he does not look for any pension. Sect. 16 deals with the penalty for obtaining pensions by fraud, and it is obvious that the fine or sum forfeited in respect of an offence is to be paid to the police fund of the authority which pays the pensions, in other words, on the facts of this case, the standing joint committee. Sect. 22 deals with the payment of pensions out of the police fund and provides in sub-s. 1: "All payments to the members of any police force or their "widows, children, and dependants under this Act, or any "enactment repealed thereby, and all payments by one police "authority to another under this Act or any such enactment, "and all other payments which in any enactment are directed "to be made out of the pension fund, shall be made out of the "police fund." It is absurd to suppose that that section can possibly apply to the borough of Swindon where the members of the police force are not employed by the borough and there is no police fund and no pretence that the borough will make any of those payments.

One is indeed driven to the conclusion that the "police "authority" is not the watch committee of the borough, but the standing joint committee. Clearly the expression "a "borough" in the schedule to the Act of 1921 must be limited to a borough which has a police authority, a chief officer of police, and a police fund. If a borough has not these things, it is not "a borough" within the schedule, and, if it does not come under the heading of "a borough," it falls under that of "a county," which may include a non-county borough. I am satisfied that the answer to the question asked by this summons, namely, "Whether the watch committee of the "council of the borough of Swindon is the police authority "for the said borough for the purposes of the House to House "Collections Act, 1939," is "No." I, therefore, decline to make the declaration asked for, and instead declare that the standing joint committee for Wiltshire is the police authority in Swindon for the purposes of the House to House Collections Act, 1939.

Judgment for defendants.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for D. Murray John, Town Clerk, Swindon.*

Solicitors for defendants: *Radcliffes & Co., for P. A. Selbourne Stringer, Trowbridge, Clerk to the Wiltshire Standing Joint Committee.*

R. F. S.

1941 Nov. 3, 11.

MOUNTAIN *v.* BERMONDSEY BOROUGH COUNCIL.

Public authorities protection—Limitation of actions—Registration officer — Charges payable by local authority — Claim for recovery — Representation of the People Act, 1918 (7 & 8 *Geo.* 5, *c.* 64), *ss.* 13, 15—*Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 3 ; *s.* 21 *sub-s.* 1.

By the Representation of the People Act, 1918, s. 15, sub-s. 1, " Any expenses properly incurred by a registration officer in the " performance of his duties, in relation to registration, including all " proper and reasonable charges for trouble, care and attention " in the performance of those duties, and any costs incurred by " him as party to an appeal (in this Act referred to as ' registration " ' expenses ') shall be paid by the council whose clerk the registration officer is . . . . in the case of the council of a borough out of " the borough fund or borough rate " :—

Held, that the non-payment of these expenses constitutes neglect or default in the execution of the statute, so that an action brought by the registration officer for their recovery is barred by the Limitation Act, 1939, s. 21, sub-s. 1, unless it is commenced before the expiration of one year from the date on which the cause of action accrued.

ACTION tried by Hilbery J.

In 1933 the plaintiff was appointed town clerk of the borough of Bermondsey, and, consequently, by s. 12, sub-s. 2, of the Representation of the People Act, 1918, he thereupon became the registration officer for the area, bound to perform the duties of that office as laid down by s. 13 of the Act (1). In

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(1) Representation of the People Act, 1918, s. 13, sets out the duties of the registration officer to compile the register of electors in his area, and to comply with any general or special directions given by the Local Government Board.

By s. 15, sub-s. 1 : " Any "expenses properly incurred by a "registration officer in the per- "formance of his duties in relation "to registration, including all "proper and reasonable charges "for trouble, care and attention "in the performance of those "duties . . . . (in this Act referred "to as ' registration expenses ') "shall be paid by the council "whose clerk the registration "officer is, or by whom he is "appointed . . . . Any such ex- "penses shall be paid . . . . in "the case of the council of a "borough out of the borough fund "or borough rate . . . ."

By Limitation Act, 1939, s. 2, sub-s. 3 : " An action upon a "specialty shall not be brought "after the expiration of twelve "years from the date on which "the cause of action accrued : "Provided that this subsection "shall not affect any action for "which a shorter period of limita- "tion is prescribed by any other "provision of this Act."

By s. 21, sub-s. 1 : " No action "shall be brought against any

1933 he claimed from the defendants, the borough council, under s. 15, sub-s. 1, of the Act (1), the expenses properly incurred by him in the performance of his duties as registration officer, but his claim was rejected, the defendants contending that the salary at which they had agreed to employ him was intended to include the expenses in question. In each subsequent year the plaintiff claimed the expenses, but the question whether he was entitled to them was never litigated or decided. In the present action he claimed to recover from the defendants 986*l*. as expenses incurred by him as registration officer from 1933 to 1939 inclusive, but he did not commence his action until after the expiration of one year from the date on which he completed his work on the register for 1939, and the defendants pleaded that his claim was barred by the Public Authorities Protection Act, 1893, and the Limitation Act, 1939 (1).

Macaskie K.C. and *Beney* for the defendants. The duty to pay these expenses to the plaintiff arises from the Representation of the People Act, 1918, s. 15, and the defendants' neglect to pay is a breach of the duty imposed on them by that Act. The action is, therefore, barred by the Limitation Act, 1939, s. 21, not having been commenced within one year from the time when the cause of action accrued. It is not essential for the defendants to show that the act or default was done or committed in connection with the discharge of a positive duty imposed on them. It is sufficient if they establish that it was some legal power or right and not a mere incidental power. In *Griffiths* v. *Smith* (2) Viscount Maugham so explains the effect of *Bradford Corporation* v. *Myers* (3). See also *Compton* v. *West Ham Borough Council* (4). In any case the

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"person for any act done in "pursuance, or execution, or intended execution of any Act of "Parliament, or of any public duty "or authority, or in respect of any "neglect or default in the execution of any such Act, duty or "authority, unless it is commenced before the expiration of "one year from the date on "which the cause of action "accrued."

(1) See note (1), ante p. 204.

(2) [1941] A. C. 170.

(3) [1916] 1 A. C. 242.

(4) [1939] Ch. 771.

plaintiff, if he recovered these sums, would by the terms of his agreement have to account for them to the defendants.

Montgomery K.C. and *Harold Williams* for the plaintiff. This debt is a specialty debt and the action is not barred for twelve years: Limitation Act, 1939, s. 2, sub-s. 3. But, even if this is not so, s. 21, sub-s. 1, does not apply to actions for work and labour done: *Milford Docks Co.* v. *Milford Haven Urban District Council* (1). In that case Romer L.J. said: "The Public Authorities Protection Act, 1893, does not "apply to actions for the price of goods sold and delivered, "and for work and labour done. That is obvious if s. 1 "is looked at. What was the only act complained of "in this case? The non-payment of money. How can it be "said that such non-payment was an act done in pursuance "or execution of any Act of Parliament . . . . or an illegal "default or neglect in the execution thereof?" In *Griffiths* v. *Smith* (2) no reference was made to cases like the present where there is merely an omission to pay expenses or charges prescribed by statute. The defendants' neglect to pay was not in connection with the performance of "the direct execu-"tion of a statute, or in the discharge of a public duty, or the "exercise of a public authority," and, therefore, the Limitation Act, 1939, s. 21, does not apply: *Bradford Corporation* v. *Myers* (3). [He cited also *Fry* v. *Cheltenham Corporation* (4).]

Macaskie K.C. in reply. The appointment and removal of the plaintiff in his office as registration officer were governed directly by the provisions of the Representation of the People Act, 1918, s. 15, and, consequently, were not of the voluntary nature referred to in *Bradford Corporation* v. *Myers* (3), but were "in direct execution of the statute." This is clear from the judgment of Slesser L.J. in *McManus* v. *Bowes* (5). *Milford Docks Co.* v. *Milford Haven Urban District Council* (1) was cited to the Court of Appeal in *McManus* v. *Bowes* (5), but it was not referred to in the judgments of the court and cannot now be regarded as an authority.

Cur. adv. vult.

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(1) (1901) 65 J. P. 483, 484.
(2) [1941] A. C. 170.
(3) [1916] 1 A. C 242, 267.
(4) (1912) 81 L. J. (K. B.) 41.
(5) [1938] 1 K. B. 98.

1941

MOUNTAIN
v.
BERMONDSEY
BOROUGH
COUNCIL.

1941. Nov. 11. HILBERY J. read a judgment, which, after stating the facts, was as follows: The plaintiff's claim was opened by Mr. Montgomery as a claim on a specialty, and it was said that the period of limitation was, therefore, twelve years under s. 2, sub-s. 3, of the Limitation Act, 1939. But the proviso to that sub-section expressly enacts that it shall not affect any action for which a shorter period of limitation is prescribed by any other provision of the Act. Under the heading: "Limitation of "actions against public authorities," s. 21, sub-s. 1, of the Act enacts in the same words as were used in the Public Authorities Protection Act, 1939: "No action shall be brought against "any person for any act done in pursuance, or execution, or "intended execution of any Act of Parliament, or of any "public duty or authority, or in respect of any neglect or "default in the execution of any such Act, duty or authority, "unless it is commenced before the expiration of one year "from the date on which the cause of action accrued."

The question, therefore, is, whether s. 21, sub-s. 1, of the Limitation Act, 1939, applies to this plaintiff's claim, as the defendants plead and contend. If so, although it be right to say that the action is "upon a specialty," none the less it is statute-barred since it was not "commenced before the "expiration of one year from the date on which the cause "of action accrued." Whether or not s. 21 applies depends on whether the plaintiff's cause of action is in respect of any neglect or default by the defendants in the execution of any Act of Parliament, duty or authority.

It appears to me to be plain that the plaintiff's claim is based on the statutory duty imposed on the defendants to pay the fees in question as part of the registration officer's expenses under the Representation of the People Act, 1918, s. 15, and the defendants' neglect or default in the execution of that duty. The plaintiff cannot and does not point to any other basis of legal responsibility on the part of the defendants. The fees are only payable by the defendants because the statute enacts that the plaintiff, as the registration officer under the Act, shall be entitled to them for doing the work imposed on him by the Act. That work was not done at the express or implied request of the defendants, nor under or as incidental to any contract with the defendants by which the plaintiff undertook to do work for them. It was done in discharge of the public duty imposed on the plaintiff by the Representation of the People Act, 1918, under pain of penalties if he did not perform it.

The defendants could not, therefore, be under any legal duty to pay these fees apart from the duty imposed on them as a public authority by the Representation of the People Act, 1918, s. 15. That section in express terms imposes on the defendants a statutory duty to pay the registration officer's expenses, including these fees. It follows that the cause of action on which the plaintiff must rely is the defendants' neglect to perform this statutory duty to pay. The fact that all that the defendants are required by statute to do in this instance is to pay money does not make the paying of that money any the less the execution of a statutory duty. Indeed, if the defendants had paid these fees, they must have relied on their having done so in execution of the statutory duty imposed on them by s. 15 to justify their having recourse to the borough fund or rate for the money so paid. There is authority for saying that the Public Authorities Protection Act, 1893, applies where a claim is made for money which a public authority is under a statutory duty to pay. In *McManus* v. *Bowes* (1), where the plaintiff claimed, among other things, a return of certain contributions made by him under the Asylums Officers' Superannuation Act, 1909, Slesser L.J. said: "The fact is that in 1930, by a decision of the "Minister of Health, it was finally determined that he [the "plaintiff] was not entitled to his pension, and from that "moment, as I see it, if he were entitled, he came under s. 10 "of the Asylums Officers' Superannuation Act of 1909, which "is to this effect: '(1.) An established officer . . . . who has "'not become entitled to a superannuation allowance . . . . "'shall be entitled to receive the aggregate amount of his "'contributions under this Act.' As from the moment

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(1) [1938] 1 K. B. 98, 126.

"when it had been finally and conclusively determined that "he was not entitled to a superannuation allowance, which "decision took effect as from the time of the decision of the "Minister of Health, he did thereafter become entitled to the "return of his contributions, and in my view the neglect to "pay those contributions, to which I will assume that he was "otherwise entitled, was a neglect within the language of the "sections of the Public Authorities Protection Act, 1893, "coming directly within the words the neglect of an 'act "'done in pursuance, or execution . . . . of any Act of "'Parliament,' namely, a neglect to do that which the Act "requires the local authority to do, that is to say, to return "his contributions. Therefore that claim also is barred by "reason of the Public Authorities Protection Act." *Milford Haven Dock Co.* v. *Milford Haven Urban District Council* (1) does not, when examined, help the plaintiff. The action there was brought on a contract under which the plaintiffs had executed certain work for the council. The Master of the Rolls pointed out that that was the real cause of action, that is to say, the public authority was sued, not for a neglect to perform a statutory duty to pay, but for a neglect to perform the duty to pay which arose out of a simple contract. That case and the present afford useful examples and instances of the non-applicability and the applicability of the period of limitation in question.

I am therefore of opinion that the claim in this action is barred by s. 21, sub-s. 1, of the Limitation Act, 1939, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *John Williams, for Wood, McClellan & Co., Chatham.*

Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

(1) (1901) 65 J. P. 483.

F. P. F.

C. A.
1941
Nov. 24;
Dec. 9.

CHARENTE STEAMSHIP COMPANY, LIMITED *v.* WILMOT (INSPECTOR OF TAXES).

Revenue — Income tax — Profits or gains — Deductions — Replacement of obsolete machinery—Ships—Replacement of several in one year—Computation of amount of deduction—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules Applicable to Cases I. & II., r.* 7.

Three steamships belonging to a company became obsolete and were assumed to have been replaced during the year of assessment. In the case of one ship the total amount of allowances for wear and tear together with the sale price of the ship was less than the original cost of the ship, but in the case of each of the other two ships the total amount of the allowances for wear and tear together with the sale price exceeded the original cost:—

Held, on the construction of r. 7 of the Rules Applicable to Cases I. & II. of Sch. D to the Income Tax Act, 1918, that the company was entitled to an allowance in respect of the replacement of the one ship without bringing into account anything in respect of the surpluses arising in the case of the other two ships.

Decision of Macnaghten J. [1941] 2 K. B. 386, affirmed on different grounds.

APPEAL from Macnaghten J. (1).

The facts as stated in the judgment of the court were as follows: The Charente Steamship Company, Ld., owned a fleet of steamships. From time to time ships which were deemed to have become unsuitable for the company's business were sold and replaced by others. During the company's trading year ending December 31, 1935, which was the basis of the assessment to income tax for the year 1936-37, the company decided to dispose of a number of ships, including the *Patrician*, the *Musician* and the *Senator*, and to replace them by others which were bought in that year. The *Patrician*, the *Musician* and the *Senator* were not sold until 1938 because no suitable opportunity for sale arose. In the case of the *Patrician*, the total amount of allowances under r. 6 of the Rules Applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918 (2), for wear and tear in the previous assessments to income tax, together with the sale price of that vessel was less than its original cost, while in the cases of the *Musician* and the *Senator* the total amount of the like allowances, when added to the sale price of the vessel, exceeded the original cost. In these circumstances, the company claimed the benefit of r. 7 in respect of the *Patrician*. The claim was resisted by the Crown on the ground that the amounts by which the total of the allowances for wear and tear and the sale price of the *Musician* and *Senator* exceeded the original cost of each of those ships should be brought into account and set off against the allowance claimed in the case of the *Patrician*.

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(1) [1941] 2 K. B. 386.

(2) By r. 6, sub-r. 1, of the Rules Applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918: " In charging the profits or "gains of a trade under this "schedule, such deduction may be "allowed as the commissioners "having jurisdiction in the matter "may consider just and reason-"able, as representing the dimin-"ished value by reason of wear "and tear during the year of any "machinery or plant used for the

The company appealed to the Special Commissioners and contended (1.) that the company was entitled in respect of the replacement of a ship where the total amount of the allowances for wear and tear in respect of that ship together with its sale price was less than its original cost to an allowance of such "deficiency" as a deduction as expenses, and, also, that it was immaterial that the replacement during the same period of some other ship resulted on the same basis in a "surplus"; and (2.) that the sales of the *Musician* and

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"purposes of the trade and belonging to the person by whom it is "carried on."

By sub-r. 6: "No deduction "for wear and tear, or repayment "on account of any such deduction, shall be allowed for any "year if the deduction, when "added to the deductions allowed "on that account for any previous "years to the person by whom the "trade is carried on, will make the "aggregate amount of the deductions exceed the actual cost to "that person of the machinery or "plant, including in that actual "cost any expenditure in the "nature of capital expenditure on "the machinery or plant by way "of renewal, improvement, or reinstatement."

By r. 7: "In estimating the "profits or gains of any trade, "manufacture, adventure, or concern in the nature of trade "chargeable under this schedule "there shall be allowed to be "deducted as expenses incurred in "any year so much of any amount "expended in that year in replacing any plant or machinery "which has become obsolete as is "equivalent to the cost of the "plant or machinery replaced after "deducting from that cost the "total amount of any allowances "which have at any time been "made in estimating profits or "gains as aforesaid on account of "the wear and tear of that plant "and machinery, and any sum "realised by the sale of that "machinery or plant."

Senator were sales of capital assets and any "surplus" was a capital profit and should be disregarded in a computation directed solely to income. The Crown contended that the *Patrician* had not in fact been replaced during the year ended December 31, 1935, but had been kept in commission (as was the fact) for some years after that year and that no prima facie case for loss or replacement had, therefore, been made out, and, alternatively, that in the application of r. 7, plant or machinery must be looked at as a whole, and in determining whether any deduction was to be allowed regard must be had to the net result of the replacement of all the plant replaced during the year ending December 31, 1935. The commissioners found that the *Patrician* had been replaced within the meaning of r. 7 within the year 1935, the period to which the assessment related, and expressed the opinion that, to determine the allowance to be made under r. 7, the plant or machinery must be taken as a whole and that the company could not be allowed to select merely those items in respect of which a loss could be shown, but that regard must be had to the net result of the whole replacement during the year. They, therefore, dismissed the appeal.

At the company's request, the commissioners stated a case for the opinion of the High Court, and the case came before Macnaghten J. The question whether the *Patrician* had been replaced in 1935 was waived at the hearing before Macnaghten J., but without prejudice to the right of the Crown to raise it again in any suitable case. Macnaghten J. allowed the company's appeal (1). The Crown appealed.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. Macnaghten J. was wrong. On the true construction of r. 7 no one item of plant or machinery can be taken separately. All the items must be taken together. The word "any" in the rule means "every." In the phrase "that machinery "or plant" the word "that" refers to the machinery or plant which has become obsolete, and the proper procedure is to examine the whole of the business and discover what loss has been sustained as a whole.

(1) [1941] 2 K. B. 386.

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J. Millard Tucker K.C. and *F. Heyworth Talbot* for the company. Macnaghten J.'s decision is correct. Rule 7 is complementary to r. 6, and gives an allowance additional to that given by r. 6. Rule 6 contemplates that deduction for wear and tear is to be given in respect of each item of machinery. The allowance referred to in r. 7 is not for a capital loss, but is a part of the money actually spent in replacing the plant or machinery. What is to be allowed is an amount equivalent to the cost of the plant or machinery replaced, less what has been already received in respect of that plant for wear and tear, and what is received on the sale of it. If the argument for the Crown is right, the wording of the rule should be "all plant or "machinery," not "any plant or machinery." Had the legislature intended that in the making of claims there should be brought into account anything in respect of items not satisfying the requirements of r. 7, it would have been easy to use some such words as "so much of the total amount as shall have "been expended," instead of "so much of any amount expended." [*South Metropolitan Gas Co.* v. *Dadd* (1) was referred to.]

Sir William Jowitt S.-G. and *R. P. Hills* in reply.

Cur. adv. vult.

1941. Dec. 9. LUXMOORE L.J. read the judgment of the court (LORD GREENE M.R., and LUXMOORE and DU PARCQ L.JJ.). This appeal raises a question with regard to the construction to be placed upon r. 7 of the rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918. Put shortly, the question is whether, for the purposes of the rule, all obsolete items of plant or machinery replaced during the appropriate period are to be dealt with individually or as a totality. The point is new and comes before this court for the first time.

The learned judge expressed the opinion that r. 7 dealt only with the case where there was a deficiency in the replacement of obsolete plant or machinery, i.e., the replacement of a capital asset, and that it presupposed that allowances for depreciation of the asset had been made in previous years and

(1) (1927) 13 Tax Cas. 205.

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the result of the replacement was a deficiency. He said that the rule did not purport to deal with the replacement of a capital asset which had resulted in a surplus, and that he could see no sufficient reason for implying what was not expressed in the rule. Before expressing that opinion, he said (1): "It "is to be observed that, if a shipowner is so fortunate as to be "able to sell his ship for more than she cost him, income tax is "not chargeable on the excess, because, as has been said, "income tax is a charge on income. It is not a tax on capital, "or on the appreciation of a capital asset such as a ship or any "other 'plant or machinery.' It would, I think, be somewhat "whimsical so to construe r. 7, which on the face of it purports "to give relief from taxation, that in effect it would impose "taxation on a subject-matter which, but for the rule, would "be exempt from taxation." With all respect to the learned judge we are unable to agree that the answer to the question raised can be found as the result of considering whether the amount by which the total of the allowances for wear and tear in respect of a ship and of the proceeds of the sale of that ship exceeds the original cost thereof is capital or income, for, although the allowances for wear and tear are permitted deductions in ascertaining the amount of the profits or gains to be brought into charge, yet none of these sums can properly be described as being capital or income. In our judgment, the answer can only be ascertained by determining the true construction of r. 7.

It is to be observed that r. 7 is itself complementary to r. 6. The latter rule provides for deduction in each year for wear and tear of plant or machinery in charging the profits or gains of a trade so long as the total amount of the annual deductions allowed on account of wear and tear does not exceed the actual cost of the machinery or plant in question. Obviously, in the application of r. 6, each item of machinery and plant falls to be considered separately, for the amount of the depreciation (which is usually assessed on a percentage basis) must necessarily vary with the nature, age and user of the particular piece of machinery or plant to be considered.

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(1) [1941] 2 K. B. 386, 389.

Rule 7 was introduced by the Income Tax Act, 1918. Its object was to allow the taxpayer some relief in cases where, during a particular year, it became necessary or prudent to acquire and instal new plant or machinery, because the existing plant or machinery, or parts of it, had become inefficient on account of obsolescence. It was not intended to apply, and obviously does not apply, to all plant or machinery acquired or installed in any particular year. By its terms the rule is limited to such plant or machinery as may be acquired or installed to replace that which has become obsolete. If the plant or machinery replaced is not obsolete—and this is a question of fact to be determined by the Special Commissioners—then the rule can have no application and no allowance can properly be claimed in respect of it: see *South Metropolitan Gas Co.* v. *Dadd* (1).

Further, it is to be observed that r. 7 authorizes a claim on the part of the subject for an allowance in respect of what, apart from the rule, would not be open to him, namely, an allowance in respect of the expenditure on new plant or machinery. The allowance has no relationship to the actual amount expended on the new plant or machinery. It is based on the original cost of the plant or machinery replaced. It can only be ascertained after bringing into account the allowances for wear and tear during the previous years in respect of each particular item replaced and the proceeds derived from its sale. Under r. 6, as has already been stated, each item of machinery or plant must in practice be considered in the first instance separately, for regard must be had to its nature, age and user, although it is true that the several sums to be allowed in respect of wear and tear are finally added together so that the amount deductible appears in the assessment as one lump sum. It has never been suggested that any part of the proceeds of sale of items of plant or machinery sold during the year ought to be considered or accounted for by the ascertainment of the allowances for wear and tear.

In considering whether any allowance can be made under r. 7, each replaced item must necessarily be considered

(1) 13 Tax Cas. 205.

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separately. The words of the rule, although they may obviously be applicable to any number of items of plant or machinery replaced, are equally obviously applicable to one such item, and it seems to us that they are so applicable because the words of the rule on their natural meaning point to a distributive construction. The words do not directly require the person claiming the allowance to bring into account anything in respect of an item or items of plant or machinery replaced which, although obsolete, would not qualify for allowance because the total amount received in respect of it or them by way of previous allowances for wear and tear and of its or their proceeds of sale exceed its or their original cost. It is the subject who makes the claim. He can make it only if the facts relating to any particular item or items satisfy the requirements of the rule. We can find no words which require the subject to bring into the account anything in respect of any particular item or items which do not satisfy those requirements. If the legislature had so intended, the latter part of the rule could easily have been framed to make that intention clear by directing the deduction from the total cost of all obsolete plant and machinery replaced during the particular year of the total amount of all allowances during previous years on account of wear and tear of all such plant or machinery and all sums realized by the sale thereof. The material words used in r. 7 are "any," not "all," and "any "sum," not "all sums."

For these reasons we are of opinion that the contention of the company is correct, and that on the facts stated the company is entitled to an allowance in respect of the replacement of the *Patrician* without bringing into account anything in respect of the so-called "surpluses" arising in the case of the *Musician* and *Senator*. In the result the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the company: *Simpson, North, Harley & Co.*

K. R. A. H.

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Landlord and tenant—Agricultural holding—Termination of tenancy—Disturbance—Tenant's right to compensation—Notice by landlord to pay rent—Rent audit notice—Service—Non-registered letter—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 1 (*b*) ; *s.* 53.

A rent audit notice, stating that an estate rent audit will be held at a certain time and place, and requesting a tenant then to pay the rent due from him, is a sufficient notice in writing to the tenant requiring him to pay the rent within s. 12, sub-s. 1 (*b*), of the Agricultural Holdings Act, 1923, and if such a notice is sent to the tenant by the ordinary non-registered post and is delivered to and received by him, there is a valid service of the notice on him under s. 53.

Appeal from His Honour Judge Langman at Great Grimsby County Court on a special case stated by an arbitrator under the Agricultural Holdings Act, 1923, Sch. II., para. 10.

Under a tenancy agreement dated November 22, 1935, W. N. M. Manby, became the tenant on April 6, 1936, of The Lindens farm, Riby, Lincolnshire. On January 19, 1940, the agents of the landlord, Edward Burgess Sharpley, served on the tenant by registered letter a notice to quit the farm on April 6, 1941, assigning among other reasons, that the tenant had failed to pay on demand the rent due from him. The tenant quitted the farm on April 6, 1941, and then lodged a claim against the landlord for compensation for disturbance under s. 12, sub-s. 6, of the Agricultural Holdings Act, 1923. The claim went to arbitration and the landlord, while admitting that the tenant had suffered loss or expense, contended that he was not entitled to recover compensation for disturbance for one or more of the reasons set forth in the notice to quit, being reasons which fell within s. 12, sub-s. 1 (*b*), of the Act of 1923 (1). The landlord relied on the following

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(1) Agricultural Holdings Act, 1923, s. 12, sub-s. 1: "Where "the tenancy of a holding ter"minates by reason of a notice "to quit given by the landlord, "and in consequence of such "notice the tenant quits the "holding, then, unless the tenant ". . . . (*b*) had, at the date of the "notice, failed to comply within "a reasonable time with any "notice in writing by the land"lord served on him requiring "him to pay any rent due in

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letters as constituting "notice in writing by the landlord "served on him [the tenant] requiring him to pay any rent due "in respect of the holding": (1.) Letter dated June 20, 1939: "The rent audit of the above estate will be held on July 5 "next at . . . . when you are requested to pay the amount "due from you." (2.) Letter dated July 6, 1939: "Thank "you for your letter enclosing cheque 134*l*. The balance "outstanding is 9*s*. 6*d*. . . . ." (3.) Letter dated January 4, 1940: A rent audit notice in terms similar to those of letter dated June 20, 1939.

The arbitrator stated a special case and submitted (inter alia) the following question for the opinion of the county court judge: "Are any, and, if so, which, of the letters set forth "in this special case, and which were delivered to the tenant "by ordinary letter post 'a notice in writing by the landlord "'served on him (the tenant) requiring him . . . .' to pay "the rent within the meaning of s. 12, sub-s. 1 (*b*), as read with "s. 53 of the Act of 1923?"

Judge Langman held that the rent audit notices were "notices "in writing" within the meaning of s. 12, sub-s. 1 (*b*), but were invalid by reason of their not having been served on the tenant in accordance with the requirements of s. 53. The landlord appealed.

Aggs for the landlord. The finding by the county court judge that the notices were not properly served pursuant to s. 53 was wrong. In *Jones* v. *Evans* (1) the Court of Appeal held, by a majority, that service of particulars of a claim under s. 18 of the Agricultural Act, 1920, could be effected orally.

"respect of the holding, or to "remedy any breach, being a "breach which was capable of "being remedied, of any term "or condition of the tenancy "consistent with good husbandry ". . . . compensation for the dis-"turbance shall be payable by the "landlord to the tenant in accor-"dance with the provisions of "this section."

Sect. 53: "Any notice . . . . "under this Act may be served "on the person to whom it is to "be given either personally or by "leaving it for him at his last "known place of abode in "England, or by sending it "through the post in a registered "letter addressed to him there."

(1) [1923] 1 K. B. 12.

"It seems to me that the legislature must have intentionally "omitted a requirement that the particulars should be in "writing": per Bankes L.J. (1). In the *Department of Agriculture for Scotland* v. *Goodfellow* (2), it was held that a removal notice under the Agricultural Holdings (Scotland) Act, 1923, sent by unregistered letter was invalid, but under that Act a good deal of formality is required, whereas it seems clear from the wording of s. 12, sub-s. 1 (*b*), that no special formality is intended. [*In re Digby* v. *Penny* (3) and *Turton* v. *Turnbull* (4) were also referred to.]

C. L. Henderson for the tenant. If the contentions for the landlord are correct, the tenant, because he has failed to pay a balance of rent amounting to 9*s*. 6*d*., has forfeited his right to compensation for disturbance. It was, however, the intention of the legislature that there should be formality so far as notices under the Act and the service thereof are concerned, in order to protect the tenant. Sect. 53 refers to every kind of service except by ordinary post. If it had been intended that service by ordinary post should suffice, the words "registered letter" would not have found a place in the section. They are, moreover, enabling words to effectuate a legal right, and, as such, are compulsory, and "may" in s. 53 should, therefore, be construed as "shall": per Lord Blackburn in *Julius* v. *Lord Bishop of Oxford* (5). The forms of service stated in s. 53 are exhaustive. There being in the present case no proper service of a notice to pay rent, there is no such notice in writing within s. 12, sub-s. 1 (*b*), and, therefore, although the notice to quit may have been, as the court below has held, good, the tenant is not deprived of his right to compensation. Moreover, a failure to pay rent on demand does not entitle a landlord to serve notice under s. 12, sub-s. 1 (*b*). There must first be a demand for the rent, and then a failure on the part of the tenant to comply with that demand within a reasonable time. The notices here were notices not of rent due but of rent to become due, and they do not satisfy the provisions of s. 12, sub-s. 1 (*b*).

(1) [1923] 1 K. B. 17.
(2) 1931 S. C. 559.
(3) [1932] 2 K. B. 491.
(4) [1934] 2 K. B. 197.
(5) (1880) 5 App. Cas. 214, 244.

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MACKINNON L.J. [after stating the facts :] The landlord appeals against the finding by the county court judge that the notices, in their terms good notices requiring the tenant to pay the rent, were not served on the tenant within the meaning of s. 12, sub-s. 1 (*b*), because of the manner in which they came into his possession. The answer to that question depends on s. 53 of the Agricultural Holdings Act, 1923. It is manifest that, if the letters in question had been left by the landlord or by any servant or agent of his at the farm of the tenant or had been given to him personally, the requirements of the section would have been complied with, but it is said that if the landlord uses the post office as a medium of communication, he does not effect a valid service of the notice unless he sends it by registered letter. The county court judge assented to that argument and held that there was no notice served on the tenant requiring him to pay his rent. Whether the facts were ever gone into by the arbitrator I do not know, but the special case seems to assume that the letters were delivered by ordinary post and received by the tenant. The whole argument must depend on that assumption, and the sole question for our decision is whether the tenant can argue that because the ordinary post and not the registered letter post was used the notice was not properly served and therefore was a bad notice. The county court judge appears to have thought that some assistance was to be derived from a case in Scotland under a totally different Act, *Department of Agriculture for Scotland* v. *Goodfellow* (1). A notice had been served by ordinary post, but the court was there concerned with a special provision of the Agricultural Holdings (Scotland) Act, 1923, which required written notice to be given either in the same manner as a notice under the Removal Terms (Scotland) Act, 1886, or in the form and manner prescribed in the Sheriff Courts (Scotland) Act, 1907. Rule 113 in the first schedule to the latter Act provided that removal notices "may be given" (1.) by a messenger-at-arms ; (2.) by a sheriff officer, or (3.) by registered letter. It is quite clear that those provisions required a certain ceremonial service, and if that ceremony had not been complied with, there had not been service within the requirements of the Act. But s. 53 of the Act with which we are now concerned does not require any ceremonial. It provides that a notice may be served on the person to whom it is to be given, either personally, or by leaving it for him at his last known place of abode. It adds, as an alternative, that the person who has to serve the notice may do so by sending it through the post in a registered letter. If he did that, no doubt, he would get the additional advantage of being able easily to prove that he had served the notice, by producing the postal receipt, but he can serve the notice personally or by leaving it at the tenant's last known place of abode. It seems to me impossible to say that under that section, if you use the post, you can only do so by the medium of a registered letter, and that, if you use the ordinary post, and the letter is delivered to and received by the person to whom the notice is to be given, you have not complied with the requirements of the Act. In the result, I think that the county court judge was wrong in that part of his decision. The appeal should be allowed and the answer of the county court judge in his formal order should be amended by substituting the answer " Yes " for the answer " No."

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(1) 1931 S. C. 559.

GODDARD L.J. I agree. I do not think it is necessary to add anything.

ASQUITH J. I also agree.

Appeal allowed.

Solicitors for the landlord : *Gibson & Weldon.*

Solicitors for the tenant : *Sharpe, Pritchard & Co., for Wm. Bains, Brigg & Scunthorpe.*

A. W. G.

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Oct. 13, 14, 15; *Nov.* 5.

In re AN ARBITRATION.

N.V. GEBR VAN UDENS SCHEEPVAART EN AGENTUUR MAATSCHAPPIJ *v.* SOVFRACHT.

Alien—Enemy—Company incorporated in allied State occupied by enemy—Right to take proceedings in English courts—Solicitor's retainer—Effect of occupation of allied State—Position at common law and under Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 1, *sub-s.* 2 (*a*); *s.* 2, *sub-s.* 1—*Defence* (*Trading with the Enemy Regulations*), 1940 (*St. R. & O.*, 1940) *No.* 1092, *reg.* 3.

A company incorporated under the laws of an allied country which has been occupied in time of war by an enemy is not, by reason of the mere fact that it continues to carry on its business in that country, to be treated at common law as an enemy alien to the extent that it is incapacitated from taking proceedings to recover a debt in the English courts. Enemy character attaches to the trade and the trading property, but not to the person, of a trader who is the subject of a state in enemy occupation.

The Trading with the Enemy Act, 1939, does not extend the class of enemies at common law, but, for its own purposes, by s. 2, sub-s. 1, as extended by reg. 3 of the Defence (Trading with the Enemy) Regulations, 1940, the expression "enemy" includes "as respects any business carried on in enemy territory [which, "by s. 15, sub-s. 1, means 'any area which is . . . . in the "'occupation of a Power with whom His Majesty is at war'], "any individual or body of persons (whether corporate or "incorporate) carrying on that business," and by s. 1, sub-s. 2, "a person shall be deemed to have traded with the enemy—(*a*) if "he has had any commercial, financial or other intercourse or "dealings with, or for the benefit of, an enemy," and, therefore, under the Act it is illegal for anyone to act for such a company in proceedings in English courts to recover a debt or enforce a business claim and for debtors to discharge their obligations to the company.

While the Act made it illegal for the company's solicitor to act under a retainer given him before the company became enemies for the purposes of the Act, the retainer was not determined by reason of the latter fact.

APPEAL from Asquith J.

The respondents, a company incorporated under the laws of the kingdom of the Netherlands and carrying on the business of shipowners with their principal place of business at Rotterdam, chartered one of their vessels to the appellants, a Russian company. The charter provided that any disputes arising under it should be settled by arbitration in London. Disputes arose between the parties and the respondents claimed arbitration in London. In April, 1940, each party appointed an arbitrator, but in May, before any further step could be taken, the Germans, who were then at war with Great Britain, invaded the Netherlands and occupied the country. The appellants and their arbitrator refused to proceed with the arbitration on the ground that the respondents had become enemy aliens, and on June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. The application was granted by the Master, and his order was upheld by Asquith J. The appellants appealed.

Gerald Gardiner for the appellants. The respondents are enemy aliens at common law. It has never been decided in precisely the same circumstances, but the authorities go to show that a trader in enemy territory is an enemy alien apart from statute: *The Ocean* (1); *Bromley* v. *Hesseltine* (2); *Roberts* v. *Hardy* (3); *Porter* v. *Freudenberg* (4); and *In re Deutsche Bank* (*London Agency*) (5). *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ld.* (6) can be distinguished. In that case, where the alien was a Belgian, the whole of Belgium was not occupied and the business was carried on in this country. A trader in enemy occupied territory would be an enemy at common law and in the same position as a trader in enemy territory, even though he was an Englishman, because such a trader by the very fact of carrying on his trade is aiding and, therefore, adhering to the King's enemies. It would be different if the trader had his business taken away from him. The respondents being enemy aliens at common law, they cannot sue in or receive any assistance from the English courts. In any case, the respondents are enemies within the Trading

(1) (1804) 5 C. Rob. 90.
(2) (1807) 1 Camp. 75.
(3) (1815) 3 M. & S. 533.
(4) [1915] 1 K. B. 857.
(5) [1921] 2 Ch. 291.
(6) [1915] 2 Ch. 409.

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with the Enemy Act, 1939, s. 1, sub-s. 2, and, therefore, cannot maintain these proceedings. The Custodian of Enemy Property had no power to give them permission to commence the proceedings. Again, the retainer of the respondents' solicitors was dissolved or suspended as soon as they became enemy aliens by force of the Trading with the Enemy Act, 1939: see *Tingley* v. *Muller* (1).

A. J. Hodgson for the respondents. The respondents are not enemies at common law, because (1.) Holland is not an enemy country or hostile territory at common law, and (2.) it has not been shown by the appellants that the respondents are voluntarily resident or voluntarily carrying on business in Holland. It is vital to keep in mind the distinction drawn between enemy territory and territory in enemy occupation: *Porter* v. *Freudenberg* (2). There is no case where a person or company trading in enemy occupied territory has been held to be an enemy at common law, and cases tending to show the contrary are *Société Anonyme Belge des Mines d'Aljustrel (Portugal)* v. *Anglo-Belgian Agency* (3) and *In re Deutsche Bank (London Agency)* (4). [Lord Greene M.R. Would not a person trading in Holland be aiding the enemy and, therefore, guilty of adhering to the King's enemies?] That would be a question of evidence and the onus must be on the party setting it up. Mere trading in enemy occupied territory cannot be held to amount to aiding the King's enemies: *Bromley* v. *Hesseltine* (5). The Trading with the Enemy Act, 1939, does not affect the status of the respondents. The whole object of the Act was to make dealings with the enemy impossible. Neither was the retainer of the respondents' solicitor terminated when they became "enemies" for the purposes of the Act. The only effect of the Act is to enforce penalties on solicitors acting for an enemy without leave.

Gardiner replied.

Cur. adv. vult.

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(1) [1917] 2 Ch. 144.

(2) [1915] 1 K. B. 857.

(3) [1915] 2 Ch. 409.

(4) [1921) 2 Ch. 291.

(5) 1 Camp. 75.

1941. Nov. 5. The following judgments were read.

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LORD GREENE M.R. [after stating the facts :] On behalf of the appellants it was submited, in the first place, that on the occupation of the Netherlands by the Germans the respondents became enemy aliens at common law by reason of the fact that they continued to carry on business in what had thus become enemy-occupied territory. It was admitted on behalf of the respondents that, if this proposition was established, the appellants were entitled to succeed since the status of alien enemy thus acquired would have prevented them from initiating proceedings in the courts of this country without a licence from the Crown, and no such licence had been obtained. The next argument presented on behalf of the appellants was that the respondents had become enemies under the Trading with the Enemy Act, 1939, and that this disabled them from taking proceedings in these courts. In answer to this argument, reliance was placed by the respondents on a letter purporting to be signed on behalf of the Custodian of Enemy Property which I will refer to more particularly hereafter. The third and last argument was that in the circumstances the retainer of the respondents' solicitors determined as soon as the Netherlands became enemy-occupied territory, and that the application, therefore, could not be entertained by the court as soon as this fact was brought to its notice.

The first argument, namely, that the respondents became alien enemies at common law when the Netherlands were occupied by the Germans, was based on the proposition that a person (not being an enemy national) who carries on business in territory occupied by the enemy—at any rate, where the occupation is of the present nature—is, so far as regards enemy character, in precisely the same position as a similar person who carries on business in enemy territory. In the case of such persons carrying on business in enemy territory the law is clear. They ipso facto acquire the character of alien enemies so far, at any rate, as regards their interest in the business and its assets: *Porter* v. *Freudenberg* (1); *The*

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(1) [1915] 1 K. B. 857.

Anglo-Mexican (1). One result that flows from this situation is that such traders are incapacitated from taking proceedings in the English courts to recover a debt due to the business, and no British subject can have any intercourse with them or give them any assistance in connection with the business. It follows that no one can lawfully act for them for that purpose or in that connection. The reason for this is, as appears from the judgment in *Porter* v. *Freudenberg* (2), that English law forbids acts " that will or may be to the advantage "of the enemy State by increasing its capacity for prolonging "hostilities in adding to the credit, money or goods, or other "resources available to individuals in the enemy State."

In the case, however, of friendly territory, which has been occupied by the enemy, very different considerations appear to me to apply. Such occupation gives rise to no change in allegiance, nor does a national of the country occupied (to quote the language of the Privy Council in reference to a neutral in an enemy State) submit himself to and take the benefit of the laws of the enemy State and in effect become one of its subjects: *The Anglo-Mexican* (1). In one sense it may no doubt be true that everyone who continues to trade in a country which has been occupied by the enemy does or may thereby benefit the enemy. Trade by individuals increases wealth and that wealth may be seized by the enemy. Manufacture produces goods which may be requisitioned by the enemy. The mere fact that the normal machinery of life is kept working benefits the enemy in the sense that he is thereby relieved, in whole or in part, from the necessity of maintaining the population out of his own resources. But prima facie the activities of a trader in enemy occupied territory are not directed to these ends, and to say that the mere act of trading must necessarily stamp him with enemy character appears to me to disregard the realities of the situation. Everyone who is living in enemy occupied territory and has not adhered to the enemy in some way or another is primarily concerned with the continuity of life in that territory. The inhabitants must eat and be clothed.

(1) [1918] A. C. 422, 425. (2) [1915] 1 K. B. 868.

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Industry and commerce must go on if the community is to exist. The butcher who continues to sell meat in his shop and the manufacturer who continues to make boots in his factory are concerned with providing the necessaries of life for the community, and neither the fact that the meat or the boots may be requisitioned by the enemy, nor the fact that the improved credit of the trader or manufacturer gives an opportunity for pecuniary extortion, nor the fact that, if the butcher did not supply the meat or the manufacturer the boots, the enemy, if sufficiently humane, might feel constrained to supply them out of his own resources, appears to me to justify the proposition that the mere act of trading in itself induces enemy character.

Of course, a man may actively and intentionally (though perhaps unwillingly) assist the enemy, for example, if he manufactures munitions of war for the enemy. In such a case it might well be argued that he had acquired the status of an alien enemy, at any rate, so far as his business was concerned, and possibly in other respects too, but I express no opinion on that matter. There is no question in the present case of actual assistance given to the enemy. The only evidence with regard to the respondents' business is contained in the affidavit of the respondents' solicitor, Mr. Freeland, who says that the respondents " are a Dutch company with "their principal place of business at Rotterdam." This evidence is, in my opinion, quite colourless.

In truth, the argument really involves the proposition that the inhabitants of the Netherlands are to be treated as co-belligerents with Germany. That Dutch territory and its inhabitants must, for certain purposes and in certain circumstances, be regarded as having an enemy character at common law is, no doubt, true. For instance, it could scarcely be disputed that goods consigned to a destination in the Netherlands could lawfully be captured at sea in the same way as goods consigned to Germany itself : see Hall's International Law, 8th ed., p. 603, and cases there cited. But this is far from establishing the general proposition. The principles on which the common law is based in these matters are extremely difficult to apply in modern circumstances, a fact which explains and justifies the passing of such legislation as the Trading with the Enemy Act, 1939. But the question which we have to consider is a narrow one. It is whether or not a company incorporated under the laws of an allied country which has been occupied by the enemy is, by reason of the mere fact that it continues to carry on its business in that country, to be treated as an alien enemy to the extent that it is incapacitated from taking proceedings in the courts of this country with a view to recovering a business debt. I can find nothing in principle or in authority to compel me to give an affirmative answer to this question.

I am glad to be able to avoid coming to a conclusion which would mean that a loyal subject of an allied sovereign, by the mere fact of continuing to carry on business and thus presumably helping his countrymen to preserve some measure of decent living in circumstances of terrible hardship and difficulty, must perforce be regarded by our courts as an alien disentitled to their protection. The subject is one on which there is no direct authority, but the view which I take appears to be, at any rate, consistent with three expressions of judicial opinion, the first by Younger J. in *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency Ld.* (1); the second by Lord Cozens-Hardy M.R. in the same case (2); and the third by Russell J. in *In re Deutsche Bank* (*London Agency*) (3).

I will now deal with the second argument based on the Trading with the Enemy Act, 1939. By s. 2, sub-s. 1, of that Act the expression "enemy" is for the purpose of the Act defined, but the definition there set out does not include a person in the position of the respondents. But this definition was extended by reg. 3 of the Defence (Trading with the Enemy) Regulations, 1940 (St. R. & O. 1940, No. 1092), so as to include "as respects any business carried on in enemy "territory, any individual or body of persons (whether "corporate or unincorporate) carrying on that business."

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(1) [1915] 2 Ch. 409, 414.
(2) Ibid. 419.
(3) [1921] 2 Ch. 291, 295.

"Enemy territory" is defined in s. 15, sub-s. 1, of the Act, the relevant words being: "any area which is in the "occupation of a Power with whom His Majesty is at war." The Trading with the Enemy Act, 1939, does not purport to impose or define enemy status otherwise than for the purposes of the Act which are (so far as relevant) the prohibition of dealings with persons who for the purposes of the Act are to be regarded as enemies. It achieves its object by prohibiting such dealings and not by any general extension of the class of enemies at common law. A person, therefore, who is not an enemy at common law is not by the Act made an enemy. All that the Act does is to prohibit certain dealings with a person of the defined class and to make certain provisions affecting his property. Except for the purposes of those prohibitions and those provisions his status is unaffected.

In the present case it is clear that for the purposes of the Act the respondents became, as respects their business, enemies when the Netherlands were occupied by the Germans. The result was that, thereafter, it was illegal for anyone to act for them in proceedings in the courts of this country to recover a business debt or to enforce a business claim and it was illegal for the appellants to discharge their business obligations to them. If the matter had stood there the appellants would have been right in their contention that the respondents' application could not be entertained by the court, not on the ground that the respondents were under a personal disability as enemies to sue as would have been the case had they been alien enemies at common law, but on the ground that the court could not listen to an application which on the face of it involved the commission of a criminal offence. But the respondents refer to the proviso to s. 1, sub-s. 2, of the Act, which says that a person shall not be deemed to have traded with the enemy by reason only that he has done anything under an authority given "by, or by any "person authorised in that behalf by, a Secretary of State, "the Treasury, or the Board of Trade." They claim that such an authority was given to them by the letter signed on behalf of the Custodian of Enemy Property to which I have already

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referred and Asquith J. accepted their contention. With all respect to the learned judge I do not agree with his view. The letter which is dated May 22, 1940, and addressed to the respondents' solicitors is in the following terms: "Trading "with the Enemy Act, 1939. S.s. *Waalhaven* in arbitration. "The Custodian has your letter of May 20. There will be no "objection so far as the Trading with the Enemy legislation is "concerned to your proceeding with the arbitration to which "you refer on behalf of Messrs. N.V. Gebr Van Uden's "Scheepvaart en Agentuur Mij. The Custodian notes that "you will account to him for any sums recovered from the "time charterers." There is no regulation or order in existence which confers on the Custodian of Enemy Property authority to act on behalf of a Secretary of State, the Treasury or the Board of Trade under the proviso to s. 1, sub-s. 2, of the Trading with the Enemy Act, 1939, and no suggestion was made that any special authority had been conferred on him.

The result, in my opinion, is that the respondents' application for the appointment of an umpire was one which ought not to have been entertained. It was impossible for anyone to act on behalf of the respondents in the matter of such an application without offending against the Trading with the Enemy Act, 1939. That Act provides, in sub-s. 2, of s. 1, that: "a person shall be deemed to have traded with "the enemy (*a*) if he has had any commercial, financial or "other intercourse or dealings with, or for the benefit of, an "enemy, and in particular . . . . (iii.) performed any obliga-"tion to . . . . an enemy." These words are wide enough to cover what was done in the present case and on the material before him Asquith J. ought, in my opinion, to have allowed the appeal from the order of the master. We were informed by counsel for the respondents that it was the practice for the Custodian of Enemy Property to give letters of the kind under consideration in cases where it was desired to conduct proceedings on behalf of persons who were enemies within the meaning of the Trading with the Enemy Act. The Custodian has apparently thought it preferable to have such proceedings conducted privately instead of obtaining a vesting order and conducting them himself. This procedure has obvious advantages from the Custodian's point of view. But it is, in my opinion, irregular to issue letters of the kind now under consideration and the practice of doing so ought to be discontinued. In cases where no vesting order is made the only proper method of procedure is to obtain an authority under the proviso to sub-s. 2 of s. 1 of the Act. We were informed by counsel for the respondents that there could be no doubt that such an authority could be obtained and at the conclusion of the argument we adjourned the hearing in order that steps might, if possible, be taken to that end. In the result two letters were produced, one dated October 15, 1941, from the Trading with the Enemy Branch (Treasury and Board of Trade) and the other dated October 18, 1941, from Sir Horace Wilson, the Permanent Secretary to the Treasury. I do not propose to inquire whether these two documents are sufficiently authenticated (see s. 12 of the Act), since Mr. Gardiner agreed to accept them as a proper authority under the proviso which they were obviously intended to be. The authority given is, however, irregular in one respect, in that it purports to be retrospective so as to cover the action of the respondents' solicitors since May 22, 1940, a thing which it obviously could not do. In the circumstances it would be a waste of time and money to compel the respondents to start afresh as they would be entitled to do under the authority now given to them. Mr. Gardiner, on behalf of the appellants, very properly assented to this view and agreed to treat the application and order now under review as having been made under the protection of that authority. The order of this court will be that the appeal is dismissed and it will be prefaced by the statement that the appellants, by their counsel, consent to having the matter treated as though the original application and the orders of the master and of Asquith J. made thereon had been made subsequently to October 13, 1941.

It only remains to say a word with regard to the third argument, namely, that the retainer of the respondents' solicitors determined on the ground that they became enemies. I express no opinion as to the effect on a retainer of the person who gave it subsequently becoming an alien enemy at common law. In the present case I agreed with the view which I understand was taken by Asquith J. that the retainer was not determined when the respondents became enemies for the purpose of the Trading with the Enemy Act. The effect of that Act was merely to make it illegal to act under the retainer for the benefit of the respondents unless and until a valid authority was obtained under the provisions of the Act.

GODDARD L.J. In this case the appellants contend that the respondents are alien enemies of the King and so are disentitled to sue in or take any proceedings before this court, and, accordingly, that a summons taken out by them for the appointment of an umpire in an arbitration ought to be dismissed as incompetent. The only evidence before the court is that contained in the affidavit sworn and filed by the solicitor acting in the arbitration for the respondents, which states that the respondents are a Dutch company, that is to say, a company incorporated under the laws of the kingdom of the Netherlands, and have their principal place of business in Rotterdam. It is further stated that Holland was occupied by the Germans in May, 1940, the arbitration having been begun in the previous month. So that, at the time the arbitration was instituted, the appellants were neutrals, the subjects of a sovereign at peace with His Majesty who has since become his ally. I think it is fair to draw the inference that the appellants are still trading, or endeavouring so to do, in Rotterdam, though it may be for the purpose only of winding up their business. On this assumption it is contended that, as they are trading in a country occupied though not annexed by the enemy, they must be regarded as enemies at common law. It is clear that by reason of the Trading with the Enemy Act, 1939, no payment can be made to them so long as their country is in hostile occupation and that for the purposes of that Act they are enemies. It is also clear that, at any rate from the time of Lord Stowell, the property of a neutral who had a commercial domicil in enemy territory was liable to seizure and condemnation as prize, but there appears to be no authority on the question whether a person living in territory occupied by the enemy, but not formally annexed by or ceded to him, is to be regarded as of hostile character for all purposes, so as to prohibit all proceedings by or on his behalf in these courts.

This war is not the first in which countries allied or friendly to Great Britain have been temporarily occupied, and if the common law regarded the inhabitants of these states as enemies one would expect to be able to find authority for this proposition, but it appears to me that such as one can find is in truth to the opposite effect. It was decided in *Porter v. Freudenberg* (1), that a person who resides or carries on business in enemy territory is an enemy. The court was there dealing with the case of a trader living in Germany and not in an occupied country. Conversely, an enemy national living in this country at the outbreak of war and allowed to remain is not an enemy: *Princess Thurn and Taxis* v. *Moffitt* (2); nor does he become so if the Crown interns him: *Schaffenius* v. *Goldberg* (3). So it is argued that, as domicil is the only test, the rule must apply to persons living in territory occupied by the enemy equally to those living within the confines of the hostile state. But the law of this country has never recognized that mere military occupation of a country makes it part of the occupiers' dominions, and no court could assume that so long as the Queen of the Netherlands is an ally of His Majesty, the kingdom of Holland has become part of Germany. Lord Ellenbrough put the matter forcibly in *Donaldson* v. *Thompson* (4) where he said: " Will anyone "contend that a government which is obliged to yield in any "quarter to a superior force, becomes a co-belligerent with the "power to which it yields? It may as well be contended "that 'neutral' and 'belligerent' mean the same thing."

But it may be said: Why, then, should the property of a person trading in the occupied country be liable to seizure and condemnation if taken at sea and all trading with him be prohibited? The answer, in my opinion, is that, because of the assistance which would otherwise be given to the enemy, a hostile character is imposed on his property and on the business which he carries on, but, though such a character is imposed on his property, it does not follow that it is imposed on his person. A trader in Germany is an enemy for all purposes. Even if he leaves Germany and gets to a neutral country he would still be regarded as ex lege in this country, for the duration of the war if he were of enemy nationality, and for so long as he had any business interest in Germany or intended to retain his domicil there, if he were a subject of a neutral power. But I apprehend that, if any Dutch subject could now escape and come to this country, he would be under no disability, except that, as regards trading with Holland, he would be in exactly the same position as British subjects are under the Trading with the Enemy Acts.

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(1) [1915] 1 K. B. 857.
(2) [1915] 1 Ch. 58.
(3) [1916] 1 K. B. 284.
(4) (1808) 1 Camp. 429, 433.

The imposition of enemy character on property was elaborately dealt with during the last war in *The Anglo-Mexican* (1), where the advice of the Judicial Committee was delivered by Lord Parker. He was dealing there with the case of a neutral in enemy country, but I cannot conceive that the subject of a neutral or allied sovereign in occupied territory could be in any less favourable position. Lord Parker said: "It seems clear that a neutral wherever resident "may, if he owns or is a partner in a house of business trading "in or from an enemy country, be properly deemed an enemy "in respect of his property or interest in such business. He "acquires by virtue of the business a commercial domicil "in the country in and from which the business is carried on, "and this commercial domicil, though it does not affect his "property generally, will affect the assets of the business "house or his interest therein with an enemy character." This passage seems to me to show that it is the business and its property and not the person of the trader on which the enemy character is imposed. Then he quotes from Story J.'s notes a passage which contains these words: "So if the "agency carry on a trade from the hostile country which is

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(1) [1918] A. C. 422, 425.

"not clearly neutral, and if a person be a partner in a house "of trade in an enemy's country, he is, *as to the concerns and "trade of that house,* deemed an enemy ; and his share is liable "to confiscation as such, notwithstanding his own residence "is in a neutral country, for the domicil of the house is "considered in this respect as the domicil of the partners." The italics are mine. It is true that this passage ends with these words—" It is a settled principle that traffic alone "independent of residence will, in some cases, confer a hostile "character on the individual," but clearly that learned author did not mean to imply that a neutral who traded with one belligerent thereby became the enemy of the other, for obviously he does not, even if he trades in contraband, and, in my opinion, he is doing no more than emphasizing that hostile character may attach to a neutral's property.

The matter may, indeed, be carried further by considering the case of a British subject who trades with the enemy. In *The Hoop* (1), goods shipped by the enemy and consigned to British subjects in whom the property had vested as the result of a sale were held liable to condemnation although the transaction had taken place in good faith and in the belief that certain orders in council permitted them to import the cargo, and the importers had been so informed by the Commissioners of Customs. Lord Stowell, in his classic judgment in that case, elaborately reviewed the authorities, and showed that it was an established rule that trading with the enemy, except under royal licence, subjected the goods to confiscation and that this rule had been enforced not only against British subjects but against allies. Yet no one has ever suggested that a British subject who trades with the enemy acquires the hostile character or is guilty of treason. Indeed, it does not seem to have been settled till the reign of William 3 that trading with the enemy was an offence, and then it was only declared to be a misdemeanor : see per Lord Mansfield in *Gist* v. *Mason* (2). If trading in occupied territory of itself invests the trader personally with a hostile character, it would seem to follow that, if any part of this

(1) (1799) 1 C. Rob. 196. (2) (1786) 1 Term Rep. 88.

kingdom or the Empire were invaded, a shopkeeper in a place temporarily under enemy control would, merely by keeping his shop open and thus endeavouring to earn a living, become an enemy of the King. At the present moment every trader of the Channel Islands would be in this embarrassing position. Indeed I cannot see why the doctrine, if such there be, should be confined to traders, for under conditions of modern warfare it is not only from traders that an enemy can get assistance, however involuntarily it may be afforded. Inhabitants of occupied territory may be made to pay levies or taxes, they may have their property seized and their persons conscribed for work for the benefit of the invader.

Support for the view that hostile character is to be imputed to the trade and not to the trader is, I think, to be found in Lord Kingsdown's opinion in *The Gerasimo* (1). He says: "The national character of a trader is to be decided *for the* "*purposes of the trade*, by the national character of the place "in which it is carried on. If a war breaks out, a foreign "merchant carrying on trade in a belligerent country has a "reasonable time allowed him for transferring himself and his "property to another country. If he does not avail himself "of the opportunity, he is to be treated, *for the purposes of the* "*trade*, as a subject of the power under whose dominion he "carries it on." Again the italics are mine. Moreover, two cases arising in the last war, *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ld.* (2), and *In re Deutsche Bank* (*London Agency*) (3), support, I think, the view that, apart from the Trading with the Enemy Act, enemy character ought not to be attributed to these respondents. I do not burden this judgment with a discussion of the cases which have turned on the question of traders availing or not availing themselves of the opportunity of transferring themselves to other countries, for in modern warfare the courtesies and conventions of other days have ceased to have effect. The total war of to-day has but little resemblance to that of even so comparatively recent a period as 1854. In the Crimean war British merchants were permitted to trade with the enemy so long as their transactions were carried on through ports not affected by the blockade, a state of affairs which to-day would be frankly incredible.

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(1) (1857) 11 Moore P. C. 88, 96.

(2) [1915] 2 Ch. 409.

(3) [1921] 2 Ch. 291.

But it may be said that by bringing arbitration proceedings the respondents are attempting to do an act in relation to their trade and that the doctrine that imposes a hostile character on trading should be invoked to prohibit this attempt. In my opinion, that would be carrying the doctrine too far, and beyond the reason for which it was imposed. If hostile character is not engrafted on the person of the litigant, I see no reason why he should not be permitted to pursue remedies in the courts of this country although he may not be permitted to receive the fruits of a judgment during the war. If he is to be regarded as hostile in his personal character it would follow that no suit, whatever its nature or object, could be entertained. Thus it would follow that, if a resident in Jersey had given a power of attorney to someone in England to safeguard or manage property that he possesses here, the attorney could not, during the war, take any steps on behalf of his principal in the courts of this country for its protection. I can find no authority which compels me to hold anything so repugnant to every sense of justice. The interests of the realm are abundantly safeguarded by the Act which forbids payments being made to the unfortunate creditor during the war. In my opinion, the true doctrine is that enemy character attaches to the trade and trading property, but not to the person, of a trader who has the misfortune to be a subject of a state in enemy occupation. But I desire to add that I do not mean to decide more than that mere trading or residence in occupied territory is not enough to impose enemy character. The present war has shown that in some invaded countries there are nationals of those states who have so identified themselves with the invader as would make it imperative to regard them as indistinguishable from nationals of the enemy. Of that there is no suggestion in the present case, and for myself I express no opinion as to what acts would be enough to cause identification or whether compulsion would form any excuse.

On the remaining points raised in this case under the statute, I agree with, and can add nothing to, the judgment of the Master of the Rolls.

DU PARCQ L.J. I agree, and, having had the advantage of reading the judgment of the Master of the Rolls, I have nothing to add with regard to the questions which have arisen under the statute. I think it right, however, to express in my own words the view which I have formed as to the status of the respondents (to whom I shall refer hereinafter as "the "company") at common law.

In my opinion, it is a principle of the common law that he who owes allegiance, or has given his allegiance, whether voluntarily or under duress, to the sovereign of an enemy state, is himself an alien enemy with whom no British subject may have dealings, and is not entitled to maintain an action in the King's courts. Thus, the subject of an enemy sovereign, resident within the enemy's country, is an alien enemy even though he may himself be well disposed to this country. The same principle underlies and explains the rule that the subject of a neutral or friendly state who voluntarily resides, or carries on business, in an enemy's country, is himself an alien enemy. It is an old principle of the common law that the subject of an enemy state who lives in England under the King's protection, though he is for some purposes to be regarded as an "alien enemy," has many of the privileges and duties of a British subject. Among his duties is the duty of giving his allegiance to the sovereign, and among his privileges is the right to maintain an action in the King's courts. If he is unfaithful to the King he may be convicted of treason, and the reasoning of Sir Matthew Hale on this point in his Pleas of the Crown is instructive. "An alien "enemy," he says, "living here in the condition of an "inhabitant or trader may be guilty of treason as well as an "alien ami, for he doth it proditorie and treacherously, and "against the obligation that lies upon him, as well as any "others, to be true to the prince, the benefit of whose laws and "protection he holds, so long as he is under the same": Pleas of the Crown, 1800 ed., vol. i., p. 94. The common law, logically and with a practical sense of reality, assumed that neutral subjects living in an enemy's country were in like case, and treated them as giving their allegiance to the enemy sovereign and as alien enemies.

When, however, a friendly or neutral country, or part of it, has been occupied by the enemy, it by no means follows that the occupied territory is to be regarded as the enemy's country for the purposes of the rule which I have stated. The question still is whether the inhabitants as a whole (or more specifically any persons among them whose status is in question) are shown to owe, or to have given, allegiance to the enemy sovereign. The answer to this question must always depend on the precise nature of the occupation, and, in particular, on the quality of the control exercised by the occupying power and the obligations, if any, undertaken by, or imposed on, the person whose status is in dispute. Thus, when an occupying power compelled the inhabitants of temporarily conquered territory to take an oath of allegiance to itself and even to serve in its army in accordance with the practice which once prevailed, it was right to regard the inhabitants of such a state as alien enemies in the full sense of the word: see Oppenheim's International Law, 5th ed., vol. ii., p. 344. On the other hand, it is clear from *The Gerasimo* (1), that a temporary occupation of a territory by an enemy's force does not of itself convert the inhabitants of the territory into enemies. Decisions in prize are not directly in point when the principles of the common law are being discussed, but it is none the less instructive to refer to and to compare two decisions of Sir William Scott, which bring out the distinction which I am endeavouring to make. In *The Bolletta* (2), he held that, while it might be true that possession "taken by force of arms and by violence" did not change the national character of a country until it was "confirmed "by a formal cession, or by long lapse of time," that character was changed by a cession transferring the territory to another

(1) 11 Moore P. C. 89.   (2) (1809) Edw. 171.

sovereign. In *The Santa Anna* (1), decided in the same year, the same learned judge declined to condemn in prize the property of friendly aliens (namely, Spaniards) " though belonging "to persons resident in those parts of Spain which are at the "present moment under French" (that is enemy) "control."

It remains to apply what I believe to be the common law principle to the facts of the present case. The company was incorporated and is resident in the Netherlands. There is no evidence before us as to its present activities, except that in an affidavit sworn on June 30, 1941, a partner in the firm of solicitors representing it deposed as follows: " The "claimants " [in the arbitration] " are a Dutch company with "their principal place of business at Rotterdam." We were told that all but one of the company's ships are now beyond enemy control and we really know nothing as to its present business activities. The only evidence before us as to the present condition of the Netherlands is a reference in the same affidavit to " the occupation of Holland by Germany in the "second week of May, 1940." We were asked to take judicial notice of the fact that this occupation continues, and there is no dispute about this, or about the fact that some degree of control, which may well be severe, is exercised by the enemy over the inhabitants. There was no evidence and no suggestion that the Dutch as a nation, or all or any of the directors of the company, had given their allegiance to the enemy. It is not, I think, in doubt or a matter of dispute that Queen Wilhelmina is still the lawful sovereign of the Netherlands, although Her Majesty has for the time being lost the possession and control of that part of her dominions. The modern rule of international law seems to be that while the occupying power exercises a military authority over the occupied territory it does not by the mere fact of occupation exercise sovereignty over it. It need not be assumed that any acts of the German government will necessarily conform to the standards of international law, but it was not suggested at the Bar, and I am not aware, that the enemy has purported to annex the Netherlands or attempted to

(1) Edw. 180.

transfer to the enemy state the allegiance which the Dutch owe to their lawful sovereign.

The question for us, therefore, comes to be this. Does the mere fact that a person is continuing to trade within territory occupied by the enemy impress that person with the character of an alien enemy at common law to the extent that British subjects may not lawfully have dealings with him and access to the King's courts is denied to him? In the light of the principle which I have stated the answer must be that it does not. There may well be cases where the occupying enemy, or some or all of the inhabitants of the occupied territory, so act that it may be a fair inference that all the inhabitants or some of them have acquired an enemy character, and each case must be decided on the facts before the court. It must not be thought, for instance, that what is true of Holland is necessarily true of Czecho-Slovakia (a country which I name because it was mentioned in the argument), or even that what is true of a country to-day will necessarily continue to be true of it while the enemy occupation continues.

I would add that, although the common law may, in certain circumstances, regard the property of one who has not himself the status of an alien enemy as enemy property for some purposes, there is, in my opinion, nothing in the facts of this case calling for the application of any such principle. All that it is necessary to decide in the present appeal, and all that I desire to decide, is that on the facts as known to us there is nothing to show that the company has such an enemy character as will preclude it from acting through solicitors in this country, or from presenting a claim in an arbitration, or from appearing as "actor" in the King's courts. In my opinion, the decision of Asquith J. on this part of the case was right. I agree that the appeal should be dismissed, and that the order of this court should be in the form proposed by the Master of the Rolls.

Appeal dismissed.

Solicitors for the appellants: *Lawrence Jones & Co.*

Solicitors for the respondents: *Constant & Constant.*

P. J. B.

1941
Oct. 15;
Nov. 25.

OPPENHEIMER *v.* MINISTER OF TRANSPORT.

Acquisition of land—Compensation—Freehold house owned with option over adjoining fields—Notice to treat for parts of fields—Injurious affection to house due to construction of works and user—Option " lands . . . . or . . . . interest therein "—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 49.

The claimant was the owner by purchase of Weir Bank, a freehold house and grounds, with an option over three fields adjoining. The option was part of the inducement to purchase Weir Bank, and was registered as a charge on the fields under the Land Charges Act, 1925. Before the option expired the Minister of Transport in exercise of his powers under the Lands Clauses Consolidation Act, 1845, served on the claimant notice to treat in respect of parts of the fields which he required for a road scheme. The claimant sought compensation (inter alia) for injurious affection to Weir Bank, due to the construction of works and user :—

Held, that the option was " lands " or an " interest therein " within s. 49 of the Lands Clauses Consolidation Act, 1845, and that Weir Bank was lands held with the fields which were to be purchased within that section, and the claimant was entitled to the compensation sought.

London & South Western Railway Co. v. *Gomm* (1882) 20 Ch. D. 562, and *Cowper Essex* v. *Acton Local Board* (1889) 14 App. Cas. 153, per Lord Watson and Lord Macnaghten, at pp. 167, 175, applied.

SPECIAL CASE stated by official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6, sub-s. 1.

By a conveyance dated February 2, 1931, the claimant became the owner of a residential estate known as Weir Bank, Bray, Berkshire. The purchase price was 6000*l.*, and it was a term in the conveyance that the claimant should have the option to buy from the vendor three fields adjoining Weir Bank for 1500*l.* The option was for ten years as from July 24, 1930, and, as the arbitrator found, the claimant would not have purchased Weir Bank unless he had also secured the option which was registered as an estate contract under the Land Charges Act, 1925, s. 10, sub-s. 1, class C. (iv.). In 1938, under a scheme for making a new trunk road, the Minister of Transport required part of each of the three fields, and on October 7, 1938, in exercise of his powers under the Berkshire County Council Act, 1937, which incorporated the Lands Clauses Consolidation Act, 1845, he gave to the claimant notice to treat in respect of those parts of the fields which he wished to acquire. At that date the claimant had not exercised his option, and the land required by the Minister at no point abutted on the claimant's land. The claimant made written claims for compensation under three heads. First, in respect of interests in the land taken, as holder of the option over the freehold he claimed the value of the land after deducting the price payable therefor by him under his option; secondly, in respect of the injurious affection of that part of the fields which was not taken, he claimed the depreciation in value so far as was found due to the works; thirdly, as beneficial owner of the freehold of Weir Bank, he claimed the depreciation to the property in respect of injurious affection thereto due to construction of works and user. The arbitrator found that the value of the fields as at the date of the notice to treat estimated in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919, did not exceed 1500*l.* He, therefore, awarded the claimant nothing in respect of the first two heads of claim. He submitted the third head as a point of law for the opinion of the High Court. If the High Court should be of opinion that the claimant was entitled to compensation under that head, he assessed the amount of the compensation at 4200*l.*

Turner K.C. and *Harold Williams* for the claimant. The right of the claimant to compensation for injurious affection of Weir Bank depends on two questions: first, whether his option over the adjoining fields is "lands . . . . or any interest "therein," within s. 49 of the Lands Clauses Consolidation Act, 1845, and, secondly, if it is an interest in land, whether Weir Bank is "land held therewith." The scale of compensation differs according to whether lands injuriously affected are held with other lands taken from the same owner. If so, he gets—(*a*) compensation for the lands taken; (*b*) compensation for severance; and (*c*) compensation for injurious affection both by the construction of the works

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and by their subsequent user. But if no lands of his are taken he gets compensation for injurious affection only in respect of the construction of the works (which the arbitrator has found to be nil in this case) and not for the subsequent user, which is the substantial matter. It is not disputed that for the purposes of the Lands Clauses Consolidation Act "interest in land" includes equitable as well as legal interests. An option to purchase creates an equitable interest in the land subject to the option; *London & South Western Railway Co.* v. *Gomm* (1), *Woodall* v. *Clifton* (2). Not only so, but it directly gives a right to compensation: *In re Cant's Estate* (3). It is registrable land. This option was registered under s. 10, sub-s. 1, class C. (iv.), of the Lands Charges Act, 1925 (15 Geo. 5, c. 22). [They cited Halsbury's Laws of England, Hailsham ed., vol. xxvii., p. 770, s. 1308.] The Minister cannot get possession of the unrestricted freehold of this land until he has merged the option in his freehold estate. Therefore, "lands" of the claimant have been taken, namely, his option, which is an equitable interest in the fields. The question whether Weir Bank is "lands held therewith" should also be answered affirmatively, for the option was contained in the contract for sale to the claimant of Weir Bank and was secured by a covenant in the conveyance of Weir Bank: *Cowper Essex* v. *Acton Local Board* (4) covers this point.

Sir William Jowitt S.-G. and *Valentine Holmes* for the Minister of Transport. The acquisition of the land by a public authority under statutory powers destroyed the option without taking the claimant's interest: *Macey* v. *Metropolitan Board of Works* (5), *Clark* v. *School Board for London* (6). As to what is "taking," see *Spencer* v. *Metropolitan Board of Works* (7), and *Baily* v. *De Crespigny* (8). Any limitation on the title to the fields is got over because the Minister was not a voluntary assign. The Lands Clauses Act, 1845, ss. 49 and 63, do not help the claimant. Those are procedure sections, and only applicable if some land is purchased from him, and the proposed road did not involve the acquisition of any portion of Weir Bank on which the claimant could found his claim: opinion of Blackburn J. in *Hammersmith and City Railway Co.* v. *Brand* (1). An owner of land can claim compensation for damage to his remaining land in respect of the use to which the land taken from him is to be put, but if no land is taken he cannot claim under this head. Further, the claim must be based on some ground which would have been actionable but for the statutory powers conferred on the Minister, where the claimant would have no action at common law. Finally, Weir Bank is not lands held with the option fields, and there is in fact no injurious affection to Weir Bank.

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(1) (1882) 20 Ch. D. 562.
(2) [1905] 2 Ch. 257.
(3) (1859) 28 L. J. (Ch.) 641.
(4) (1889) 14 App. Cas. 153.
(5) (1864) 33 L. J. (Ch.) 377.
(6) (1874) L. R. 9 Ch. 120.
(7) (1882) 22 Ch. D. 142.
(8) (1869) L. R. 4 Q. B. 180.

Turner K.C. in reply. Admittedly the extinction of an easement by a statutory undertaker leaves the dominant tenement entitled to compensation only for injurious affection due to the construction of the works and not for that due to subsequent user. An option to purchase is, however, not analogous to an easement but rather to the reversion under a lease in which the lessor's interest is deferred. Cases dealing with easements are, therefore, no authority against the right of the claimant to compensation in the present case. The notice to treat creates a relation between owner and promoter: Cripps on Compensation, 8th ed., p. 59. If this is an interest in land requiring notice to treat the method of compensation is under the Lands Clauses (Consolidation) Act, 1845, s. 68, on the basis of—(*a*) the value of land taken, (*b*) injurious affection to other lands, and (*c*) disturbance, a ground which covers persons whose lands are injuriously affected, although no land is taken.

Cur. adv. vult.

1941. Nov. 25. VISCOUNT CALDECOTE C.J. read a judgment in which, after stating the facts, he said: There can be no doubt that, if the claimant had exercised his option before the notice to treat was served on him, he would have been entitled to be paid the full value of the strip of land taken

(1) (1869) L. R. 4 H. L. 171, 195.

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by the Minister, as well as compensation for the injurious affection of his land held therewith. The option not having been exercised, the claimant's case is that his option was lands or an interest in land for the purposes of the Lands Clauses Act, and that he is a party entitled to compensation in respect of land taken. From this it would follow that the claimant is entitled to compensation for injury done to the lands held therewith: Lands Clauses Consolidation Act, 1845, s. 49.

The claimant has first to establish the contention that his option to buy the fields was "lands" or an "interest therein," for the purposes of the Lands Clauses Act. The fact that the Minister of Transport gave notice to the claimant as a party "interested in such lands" (s. 18) of his intention to take part of the option fields is not conclusive, though the words themselves which I have quoted from s. 18 are material as showing what is the subject of compensation under the Act. Sect. 3, which is a definition section, throws no light on the question. Sect. 21 deals with the method of settling the amount of compensation to be paid "for the interest in . . . . lands belonging "to" a claimant. Sect. 23 requires a notice stating "the "nature of the interest" in respect of which compensation is claimed. Sect. 68, which is a machinery section, comes into operation "if any party shall be entitled to any compensation "in respect of any lands, or of any interest therein, which "shall have been taken for or injuriously affected by the "execution of the works, and for which the promoters of the "undertaking shall not have made satisfaction." That the claimant had an "interest," in the ordinary and natural sense of the word, in the option fields during the currency of the option seems plain. It was, moreover, an interest of such a nature as to be capable of registration as a charge on the option fields under the Land Charges Act, 1925. Further, the right to call for a conveyance of land has been held to be an equitable interest or equitable estate: *London & South Western Railway Co.* v. *Gomm*, where Sir George Jessel M.R. said (1): "A person exercising the option has to do two "things, he has to give notice of his intention to purchase, and

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(1) 20 Ch. D. 562, 581.

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"to pay the purchase money; but as far as the man who is "liable to convey is concerned, his estate or interest is taken "away from him without his consent and the right to take it "away being vested in another, the covenant giving the "option must give that other an interest in the land."

For all purposes under the Lands Clauses Act, I think that an interest in land is "lands." It is not possible to find any one clear indication in the elaborate provisions of the Lands Clauses Act that this is true, but I think it is a correct conclusion from the whole of the Act. Any person having an interest, be he freeholder or a person holding some lesser interest in the land in question, is intended to be entitled to compensation in one form or another in respect of his interest, whatever it is, if it is compulsorily taken from him. So much was scarcely disputed by the Solicitor-General on behalf of the Minister of Transport, though he was not prepared to admit the claimant's contention, particularly on the ground that, as the Solicitor-General submitted, the option was merely personal to the claimant. The main argument on behalf of the Minister was that no "lands" or "interest therein" of the claimant had been taken. Such as the claimant's right was, it had merely been rendered incapable of exercise in circumstances which gave no right to any compensation. It had in fact been destroyed by the Minister's exercise of powers given him by Parliament. It was said by counsel for the claimant that a similar argument was submitted and rejected in *In re Cant's Estate* (1). The facts of that case were that a testator by his will gave one of his sons a right of pre-emption of certain hereditaments for a named sum after the death of the testator's widow. Before that event happened the hereditaments in question were acquired compulsorily by a railway company and the purchase money was invested. When the testator's widow died the son claimed so much of the invested fund as represented the hereditaments on paying the stipulated price. Stuart V.-C. held that the right of pre-emption had become extinguished by the conveyance to the railway company. On appeal to the Lords Justices this decision was

(1) 28 L. J. (Ch.) 641.

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reversed on the ground that the right of pre-emption remained unaffected by the Act. I doubt whether any guidance is to be found from this decision which turned on the view taken by the Lords Justices as to the nature of the fund in court.

The decision in *Baily* v. *De Crespigny* (1) to the effect that a covenantor is discharged from his covenant if an Act of Parliament puts it out of his power to perform it, was relied on by the Solicitor-General, but it seems to me remote from the question we have to decide. Here it is true to say that the condition binding the vendor of Weir Bank to convey the option fields to the claimant on payment of the agreed sum became impossible of performance by the vendor, but none the less it may be the case that the interest held by the claimant arising out of the covenant has been taken by the Minister of Transport so as to require him to pay compensation for it. Although we were not referred to and I have not been able to find any case in which this question has arisen on similar facts, I hold the opinion that this is the right view. The plain fact, as it appears to me, is that the Minister has taken land in which both the owner of the freehold and the claimant, by virtue of his option, have an interest. Why should one be entitled to be paid for what he loses and not the other? I can see no distinction in principle between the two cases. If one plays with the words, it may be one way of describing the facts to distinguish this case on the ground that the interest of the claimant has been destroyed. But the truth is that the freehold was no use to the Minister unless the claimant's option came with it. Even assuming it is right to say that the option was destroyed, I see no reason to infer from this that the claimant's interest was not taken. To hold that it was not taken would, I think, be a denial of the substance of the transaction and contrary both to common sense and to the intention of the Lands Clauses Act.

The three cases concerning easements to which we were referred—*Thicknesse* v. *Lancaster Canal Company* (2); *Macey* v. *Metropolitan Board of Works* (3); and *Clark* v. *School*

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(1) L. R. 4 Q. B. 180.

(2) (1838) 4 M. & W. 472.

(3) 33 L. J. (Ch.) 377.

Board for London (1)—are different in principle. A purchaser of land over which there is a right in the nature of an easement does not necessarily want to interfere with the easement. If and when he does interfere with it, then compensation is to be paid in respect of the injury suffered by the person entitled to the easement. It is not a case of the acquisition of the easement, but only of that of the servient tenement. The option to purchase in the present case is wholly different. It seems to me that at the moment at which the Minister takes the freehold he must also take the claimant's interest, because otherwise his purchase of the freehold would not serve his purpose.

The remaining question is whether, on the assumption that the Minister has taken land of the claimant, the claimant can claim compensation in respect of injurious affection of Weir Bank. This depends on the question whether Weir Bank is held with the land taken. Applying the test laid down by Lord Watson and Lord Macnaghten in *Cowper Essex* v. *Acton Local Board* (2) I am of opinion that Weir Bank, in respect of which the claim for injurious affection is made, is held with the lands to be purchased within the meaning of the Lands Clauses Consolidation Act, s. 49. I would, therefore, answer the question submitted to us in the affirmative.

HUMPHREYS J. I am of the same opinion.

ASQUITH J. read the following judgment: I concur entirely in the judgment delivered by my Lord, and will only summarize the grounds of my decision.

First, the Lands Clauses Act, 1845, appears to draw no distinction between an interest in land and land itself. Secondly, it is conceded by the Solicitor-General on behalf of the Minister of Transport that, for the purposes of the Act and of this case, there is no material distinction between a legal interest in land and an equitable interest. Thirdly, *London & South Western Railway Co.* v. *Gomm* (3) decides that

(1) L. R. 9 Ch. 120.

(2) 14 App. Cas. 153, 167, 175.

(3) 20 Ch. D. 562.

the holder of an option over land has an equitable interest in that land. Such a person is, therefore, entitled to land or its equivalent. Fourthly, if someone is entitled to land and that is taken for the purpose of executing works on it with the consequence that other land held with it is injuriously affected, the person entitled to the first can claim compensation for injurious affection to the second by reason either of the execution of such works or of their user.

In the present case a part of what have been called the option fields have been taken by the Minister. The claimant's interest in those fields consisted in a right to require, subject to certain conditions as to notice and tender, the fee simple therein to be transferred to him. The expropriating Minister has required, subject to conditions which I agree are not identical, that interest to be transferred to himself. This amounts, in my view, not merely to an extinction of the claimant's rights, but the absorption, the appropriation and transfer of those rights, or, at all events, of something which includes those rights, to the Minister. What the claimant has lost the Minister has gained, and in those circumstances the conclusion is irresistible that he has "taken" the land of the claimant.

This seems to me to conclude the issue raised by the special case in favour of the claimant. I only add two or three sentences in reference to certain contentions on which the Solicitor-General relied. Much reliance was placed by him on *Baily* v. *De Crespigny* (1), but that case seems to me to decide directly no more than that, if A and B have a contract in relation to land and later that land is seized by an authority acting under statutory powers, the contract is frustrated. It decides nothing as between either contracting party and the expropriating authority. It is with their rights inter se, and their rights alone, that the case is concerned. It was also submitted that the option vested in the claimant was a right merely personal to himself, the suggestion being, I suppose, that such a right is more easily destroyed than another. If this means, and I can think of no other relevant meaning, that it was merely

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(1) L. R. 4 Q. B. 180.

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a contractual and not a proprietary right, then it appears to me that *London & South Western Railway Co.* v. *Gomm* (1) is an authority to the contrary. Lastly, reliance was also placed on cases referred to by the Lord Chief Justice in which lands were taken which were subject to easements. Assuming an easement for this purpose to be an interest in land, what was taken in those cases was not an easement, but the land subject to the easement, and, therefore, the bearing of those cases on the question before this court is very remote.

For these reasons I am of opinion that the question raised in the special case ought to be resolved in the manner indicated by my Lord.

Questions answered.

Solicitors for claimant: *Herbert Oppenheimer, Nathan and Vandyk.*

Solicitors for Minister of Transport: *Treasury Solicitor.*

F. P. F.

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(1) 20 Ch. D. 562.

SPOTTISWOODE BALLANTYNE AND COMPANY, LIMITED *v.* DOREEN APPLIANCES, LIMITED, AND ANOTHER.

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Nov. 6, 7, 10, 21.

Contract—Agreement to grant a lease—Agreement subject to references being satisfactory and to the terms of a formal agreement to be prepared by lessor's solicitors—Agreement prepared by solicitor—Acceptance of terms by lessees—Refusal by lessors to grant lease—Claim for possession—Counterclaim for specific performance of agreement.

The plaintiffs, who were owners of a lease of premises, by a letter written by their agents agreed to let the premises to the defendants "subject in the usual way to your references being "satisfactory and to the terms of a formal agreement to be "prepared by their [the plaintiffs'] solicitors." They also said that, if the references were approved and the defendants paid a quarter's rent in advance, they would do certain work to the premises and would allow the defendants to enter into possession, provided that the defendants gave an undertaking to vacate the premises if no agreement was entered into. The defendants paid

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the quarter's rent in advance, entered into possession of the premises, and spent a substantial sum in installing machinery. The plaintiffs' solicitors drew up a draft lease, which was sent to the defendants, who agreed the terms with the plaintiffs' agents. A few days later the plaintiffs refused to proceed with the agreement to let the premises to the defendants and called on them to remove their machinery and to vacate the premises. As the defendants refused to do so, the plaintiffs brought an action to recover possession, alleging that the defendants were tenants at will and that after receiving notice to quit they were wrongfully in possession of the premises. The defendants counterclaimed for specific performance of the agreement by the plaintiffs to give a lease of the premises to them :—

Held, that the defendants were not tenants at will, but were in possession of the premises on the terms of the lease agreed by them with the plaintiff's agents, and that they were entitled to specific performance of the agreement by the defendants to grant them a lease in those terms.

Action tried by Atkinson J.

The plaintiffs, Spottiswoode Ballantyne & Co., Ld., were the lessees of No. 7 Little New Street, Shoe Lane, E.C., under a lease which would expire on September 25, 1942. The first defendants, Doreen Appliances, Ld., were a company which marketed certain goods manufactured by the second defendants, G. Barclay (London), Ld., a subsidiary company of the first defendants, who held all the shares in it and controlled it. The goods which were manufactured by the second defendants involved the use of machinery. On July 30, 1941, Mr. Blochert, on behalf of the first named defendants, entered into negotiations with a Mr. Woolf, a member of the firm of Farebrother, Ellis & Co., estate agents, who were acting for the plaintiffs, for a lease of the first and second floors of the plaintiffs' premises at No. 7 Little New Street. The position of the two defendant companies was explained to Mr. Woolf, who was told that, although Doreen Appliances, Ld., would be the lessees and in possession of all the premises, the intention was that Barclay, Ld., should occupy part of the premises where they could carry on the manufacture of those appliances which Doreen Appliances, Ld., marketed.

Mr. Woolf agreed that if a lease was granted the plaintiffs would whitewash the walls and erect certain partitions in places then agreed upon and also that they would heat the two floors along with the rest of the premises, and he asked Mr. Blochert to put his offer in writing.

On August 1, 1941, the first named defendants wrote a letter to the estate agents acting for the plaintiffs in the following terms: "We herewith make you the following offer "for the premises in Shoe Lane. We will take the first and "second floors at a rental of 275*l.* inclusive . . . . We will "take over these premises after the partitions have been "made up, and the wall is whitewashed, by the latest "August 15 of this year, but we should like to have permission "to move our goods in before this date." Then followed the names of six firms who were stated to be the references offered by these defendants. On the same day the estate agents replied: "We are obliged by your letter of to-day's date, "making an offer to take the first and second floors as inspected. "We have submitted this to our clients who are prepared to "proceed with the letting, subject in the usual way to your "references being satisfactory and to the terms of a formal "agreement to be prepared by their solicitors. We have to-day "applied for the references, and as soon as these are approved "by our clients we will ask you to let us have your cheque "for one quarter's rent in advance, namely, 68*l.* 15*s.*, when "our clients will give instructions for the necessary work to "be put in hand, and will be willing for you to enter into "possession provided the rent is paid from the date you take "it over and you give an undertaking to vacate when called "upon, if no agreement is entered into . . . . It is understood "that you will be put to no expense in connection with the "preparation of the agreement by the landlord's solicitors."

The references having proved satisfactory, the estate agents asked for a quarter's rent in advance which was paid on August 8. The first defendants then told the plaintiffs' engineer that the rent had been paid and asked the plaintiffs to do the agreed whitewashing and whether the defendants could go in. The plaintiffs' engineer said that the defendants could go in and he would do the whitewashing. The work was done on August 11 and 12, and on August 13 the defendants began to move in their machinery. On

August 13 the defendants received from the plaintiffs' solicitors the draft tenancy agreement. Mr. Blochert telephoned to the secretary of the plaintiffs and said that the agreement was all right with the exception of two or three small points. The secretary in reply told him to see Mr. Woolf about those matters. On August 18 the estate agents sent to the defendants' representative the following form of undertaking: "In consideration of your allowing us to enter into possession "of these premises, pending the completion of the tenancy "agreement, we hereby undertake, in the event of the said "agreement not being completed within a reasonable time, "to remove all our plant and other effects on demand and "make good any damage caused to the premises as a result of "our occupation." The letter from the estate agents, in which the form of undertaking was enclosed, stated: "This, "of course, is a matter of form pending the completion of the "agreement." This form of undertaking was never signed by the defendants.

On August 20 Mr. Blochert saw Mr. Woolf and discussed the tenancy agreement with him, which Mr. Blochert said was satisfactory but he would like it to record the consent to Barclays occupying part of the premises and the agreement as to heating and the partitions. Mr. Woolf agreed to the tenancy agreement being altered to cover those matters. It then appeared that the draft tenancy agreement which Mr. Woolf had before him contained two clauses which were not in the draft tenancy agreement sent to the defendants, they having been inserted in Mr. Woolf's draft at the request of the plaintiffs. Mr. Blochert objected to one of the clauses, but was willing that the second clause with certain alterations should be inserted in the tenancy agreement. Mr. Woolf agreed and, accordingly, struck one clause out of the agreement and added certain words to the second clause. Mr. Blochert then offered to sign the agreement, but Mr. Woolf said it ought to be re-engrossed and it was, therefore, not signed. Mr. Woolf agreed that it was unnecessary for Mr. Blochert to sign the undertaking sent on August 18. On August 28 Mr. Blochert received from the plaintiffs a letter in the following terms: "After consideration we now find "that we are not willing to proceed with the agreement "concerning the letting of our premises to your company. "Will you, therefore, kindly take steps to remove on or before "Wednesday, September 3, 1941, any property belonging to "you now on the premises. When this has been done, and "all accounts that may be owing to us have been settled, "we will refund you the cheque for one quarter's rent which "you paid in advance." The defendants had spent between 300*l.* and 400*l.* in moving their machinery into the premises, and all the parties had known that the installing of the machinery would be a matter of considerable expense.

The defendants refused to remove their machinery from the premises. The plaintiffs thereupon brought this action in which they alleged that the defendants were merely tenants at will, that they received notice terminating the tenancy on August 28, 1941, and that thereafter they had been in possession wrongfully. By their defence, the first defendants claimed that they were in possession under an agreement to give them a lease from August 15, 1941, to September 25, 1942; that they went into possession under this agreement; that they paid a quarter's rent in advance; and that they were entitled to a lease; and they asked by counterclaim for specific performance of the agreement to give it to them. The second defendants claimed that they were in occupation of part of the premises with the leave and licence of the first defendants, and, if it was necessary to prove it, with the consent of the plaintiffs.

Lightman for the plaintiffs. The defendants are merely tenants at will and that tenancy having been terminated by notice to quit, the plaintiffs are entitled to judgment for possession. The plaintiffs by their letter of August 1, agreed to let the premises to the defendants but "subject to the "terms of a formal agreement to be prepared by their "solicitors." It has been settled by a number of cases that there was no binding agreement between the parties until the formal lease had been executed. The courts cannot enforce a contract to make a contract. Even if the plaintiffs agreed to give the defendants a lease as drawn by the plaintiffs' solicitors, there could be no concluded agreement until the lease had been executed: see *Raingold* v. *Bromley* (1), unless the defendants bound themselves to accept the terms of a lease drafted by the plaintiffs' solicitors. [Williams's Vendors and Purchasers, 4th ed., vol. i., p. 18; *Rossdale* v. *Denny* (2); *Lloyd* v. *Nowell* (3); *Lockett* v. *Norman-Wright* (4) were also cited.]

Solley for the defendants. On the letters of August 1 there was a binding promise by the plaintiffs to grant a lease to the defendants subject (1.) to the defendants' references being satisfactory, (2.) to the preparation of a formal agreement by the plaintiffs' solicitor, and (3.) to the defendants' acceptance of that formal agreement, all of which conditions precedent were complied with. The plaintiffs' letter must be construed according to what the plaintiffs conceived the defendants would understand from it. The plaintiffs could not have intended the defendants to understand that, if they paid a quarter's rent in advance and went into possession of the premises, spending a large sum in installing machinery, they could be capriciously turned out, notwithstanding that they had accepted the terms of the draft lease prepared by the plaintiffs' solicitor. As the terms of the proposed lease were agreed by the parties the court will enforce the agreement to grant a lease.

Lightman replied.

Cur. adv. vult.

1941. Nov. 21. ATKINSON J. The case turns mainly on the true construction of the letter of the plaintiffs' agents of August 1, 1941. The argument for the plaintiffs rests principally on the words in that letter: "Subject to "the terms of a formal agreement to be prepared by their "[the plaintiffs'] solicitors." It is said that these words mean: "There is to be nothing binding upon the plaintiffs

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(1) [1931] 2 Ch. 307.
(2) [1921] 1 Ch. 57.
(3) [1895] 2 Ch. 744.
(4) [1925] Ch. 56.

"until a formal lease is executed by them." Until then they must not be taken "as having agreed to give the defendants "a lease." It is argued that the construction of these words is governed by a long line of cases relating to alleged contracts for sale contained in correspondence in which some such words as "subject to contract," have been used, and it has been held that there was no binding agreement until a formal contract had been entered into.

There are several rules of construction which I must bear in mind in determining the true meaning of this letter. There is the principle laid down by Parke B. in delivering the judgment of the Exchequer Chamber in *Ford* v. *Beech* (1), where he said: "In adjudicating upon the construction and "effect in law of this agreement, the common and universal "principle ought to be applied; namely, that it ought to "receive that construction which its language will admit, "and which will best effectuate the intention of the parties, "to be collected from the whole of the agreement, and that "greater regard is to be had to the clear intent of the parties "than to any particular words which they may have used in "the expression of their intent." Then I have the guidance of Fry J. in a short passage in his judgment in *Bonnewell* v. *Jenkins* (2), where he was dealing with a somewhat similar problem. There the defendant had placed a leasehold property in the hands of a house agent for sale and the plaintiff wrote to the agent: "In reference to Mr. Jenkins' "property in Fleet Street . . . . I think 800*l.* for the lease, "fixtures, etc., is about the price I should be willing "to give. Possession to be given me within fourteen "days from date . . . . This offer is made subject to the "conditions of the lease being modified to my solicitor's "satisfaction." The answer came: "We are instructed to "accept your offer of 800*l.* for these premises, and have asked "Mr. Jenkins' solicitor to prepare contract." The required modification in the lease was procured. It was held by Fry J. and by the Court of Appeal that, notwithstanding the reference to a future contract, the two letters constituted a complete contract. I am not sure, however, that one case is much of a guide in deciding another. It all depends on the words used, but the passage of interest to me is at the beginning of Fry J.'s judgment (1): "Now, in my view, the "true rule for construing an instrument is to consider what "the writer must have conceived that the reader would under-"stand from it. What, then, in this case, would Mr. Bousfield "conceive that Mr. Bonnewell would understand to be the "effect of his letter?" The late Sir Frederick Pollock put it thus: "We have to remember that a promisee's first and "paramount claim is the fulfilment of the contract according "to its terms as reasonably understood." Again, if words may be construed in two ways the court leans to the more reasonable of the two constructions, and, of course, there is always in the background the maxim as to a document being construed contra proferentes.

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(1) (1848) 11 Q. B. 852, 866.

(2) (1878) 8 Ch. D. 70.

In the present case, did the plaintiffs in truth intend the defendants to understand that, if they paid a quarter's rent, went into possession, and spent a large sum of money in installing their machinery, they could be capriciously and wantonly turned out the next day although they had accepted the terms of the draft lease prepared and sent to them by the plaintiffs' solicitor? I am perfectly satisfied that Mr. Blochert never understood anything of the kind, and I do not believe for a moment that the plaintiffs could have thought that he would understand anything of the sort. In a transaction such as that contemplated here there are two parts, and it is very important to bear that in mind. There is the agreement to give a lease, and there is the lease itself, and, if there is in existence a good agreement to give a lease, a tenant in possession under it holds on the terms of the intended lease. That was settled in *Walsh* v. *Lonsdale* (2) as long ago as 1882. Generally speaking, where in correspondence offers are made or accepted "subject to contract" or some such words, the courts have taken the view that the writer is saying: "You must not take this as a binding offer or "acceptance. I am not legally bound until I have signed

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(1) 8 Ch. D. 71.

(2) (1882) 21 Ch. D. 9.

"the formal contract." I think that is put quite clearly in *Chillingworth* v. *Esche* (1), where Sargant L.J., in his judgment, said (2): "To my mind the words 'subject to contract' or "'subject to formal contract' have by this time acquired "a definite ascertained legal meaning—not quite so definite "a meaning perhaps as such expressions as f.o.b. or c.i.f. in "mercantile transactions, but approaching that degree of "definiteness." But the contract referred to in the expression "subject to contract" in these cases was the contract or agreement to sell, or the contract or agreement to lease, not the lease which was the subject-matter of the alleged contract. Where the question is whether an agreement to enter into some transaction has been concluded, the circumstance that the parties intend a subsequent agreement in writing to be made is evidence to show that they did not intend the previous negotiation to amount to a binding agreement, but the circumstance that they intend the contemplated transaction to be entered into by a formal document does not prima facie indicate any intention as to the agreement itself. It is one thing if I agree to give a lease on the terms discussed, but stipulate that my agreement is subject to confirmation by a more formal document. It is quite another thing if I agree to give a lease on the terms discussed, but stipulate that the lease which I am promising to give must be prepared by my solicitor. An agreement to give a lease subject to the condition precedent, namely, the coming into existence of a lease prepared by the solicitor, may be a perfectly good agreement.

It is quite clear that the "formal agreement" referred to in the letter of the plaintiffs' agents of August 1, is not the alleged agreement to give a lease. The words refer to the actual lease, which it is alleged had to be given in pursuance of this agreement. I am using the word "lease" in preference to the expression "tenancy agreement," because the word "agreement" may create confusion. The word "agreement" is used three times in the letter of August 1—at the end of the second paragraph: "subject to the terms

(1) [1924] 1 Ch. 97. (2) Ibid. 114.

"of a formal agreement to be prepared"; at the end of the next paragraph: "you give an undertaking to vacate when "called upon if no agreement is entered into"; and, finally, in the last line: "no expense in connection with the "preparation of the agreement by the landlord's solicitors." It is obvious that the word "agreement" in the second paragraph of the letter—"a formal agreement to be prepared" —has no reference to the agreement which I am considering, but refers to the lease which is to be prepared by the solicitors and which is to be given in pursuance of the agreement which it is said this letter constitutes. Again, it is equally clear that the agreement referred to in the last line of the letter is the lease. The word "agreement" in the middle paragraph may very well refer to the coming together of the parties and to their becoming at one about the terms of the lease.

To try to construe this letter in greater detail, the defendants' letter of August 1 had contained a definite offer, and I have drawn attention to the contrast between the use of the words "take over these premises" by August 15, and the asking permission to move goods in before that date. The reply was: "We have submitted this letter to our clients "who are prepared to proceed with the letting." I suppose the word "proceed" means go on with the letting to the end. There are, at any rate, many better ways of "proceeding" than by digging in your toes and refusing to go any further. There is no dispute whatever as to what the word "letting" refers to. Every term up to that moment had been agreed—not the formal terms which the plaintiffs' solicitors might incorporate in the lease, but the plaintiffs knew what the letting under discussion was, the premises, the period of time, the rent, the erection of partitions, and the like. The agents say: "We have submitted this letter to our clients who are prepared "to proceed with the letting, subject in the usual way to your "references being satisfactory"—that is one condition precedent—"and to the terms of a formal agreement to be "prepared by their solicitors." That is, certainly, a second condition precedent, and there may be a third condition, the acceptance of those terms by the defendants. Then comes the third paragraph in the letter, stating that the cheque is to be paid quite regardless of whether or not the defendants enter into possession. "If your references are satisfactory "we will ask you for your cheque and instructions will be "given for the necessary work to be put in hand and they will "be willing for you to enter into possession provided the rent "is paid from the date you take it over." Again, one has the contrast between going into possession and taking over : the payment is to run "from the date you take it over and you give "an undertaking to vacate when called upon if no agreement is "entered into."

The defendants argue that that is a binding promise subject to two conditions precedent or possibly to three. A promise subject to a condition precedent is just as much a legal bargain as an unconditional promise. A condition may depend on an event which in itself is dependent on the will of one of the parties, or of a third party, though not an arbitrary will. When property is sold subject to a valuation by a named third party, that valuation is a condition precedent to the obligations on both sides coming into existence, but when once the valuation is made the condition is performed and liability attaches. If for any reason the valuation is not made—as, for example, because of the death or refusal to act of the valuer—the contract is not enforceable. But, in the present case, as soon as the terms of the formal lease have been prepared by the plaintiffs' solicitor, and, on the instructions of the plaintiffs, submitted to the defendants as the performance of this condition, the promise becomes certain, determinate and unconditional, save possibly for the condition that these terms have still to be accepted by the defendants.

The courts have never had any difficulty about enforcing agreements to grant leases if there is provision whereby the terms can become fixed, for example, an agreement to grant a lease "on the usual terms." It is a question of fact what terms are "usual." It is something which can be rendered certain, "id certum est quod certum reddi potest." In

Broom's Legal Maxims, 10th ed., p. 422, I find this passage under the maxim which I have just quoted: "This maxim, "which sets forth a rule of logic as well as of law, is peculiarly "applicable in construing a written instrument. For instance, "although every estate for years must have a certain "beginning and a certain end, 'albeit there appears no "'certainty of years in the lease, yet, if by reference to a "'certainty it may be made certain, it sufficeth.' Therefore, "if a man make a lease for so many years as J. shall name, "this is a good lease for years; for though it is at present "uncertain, yet when J. hath named the years, it is reduced "to a certainty." One can scarcely imagine a more important term of a lease than the number of years for which it is to last, and if that maxim is true of that term, why not of other terms?

It was then contended that the court cannot enforce a contract to make a contract. There is, I think, a fallacy in that argument, and the fallacy was pointed out by Sargant L.J. in *Chillingworth* v. *Esche* (1): "As regards this "second contention"—that is, the contention that you cannot enforce a contract to enter into a contract—"I desire to say "one or two words as to the phrase 'contract to enter into a "'contract.' This phrase is used by Parker J. in his classic "judgment in *Von Hatzfeldt-Wildenburg* v. *Alexander* (2), "but only, I think, as a secondary or less accurate method "of stating the alternative. In the strictest sense of the "words the court will often enforce a contract to make a "contract. The specific performance of a formal agreement "of purchase is the enforcement of a contract to make a "contract; the ultimate conveyance being often in itself in "many respects a contract. The same remarks apply to the "specific performance of a clause in a lease giving the lessee "an option to purchase the superior interest of the lessor, "freehold or leasehold as the case may be. The true meaning "of the phrase is that the court will not enforce a contract "to make a second contract part of the terms of which are "indeterminate and have yet to be agreed, so that there is

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(1) [1924] 1 Ch. 113.

(2) [1912] 1 Ch. 284, 289.

"not any definite contract at all which can be enforced, but "only an agreement for a contract some of the terms of which "are not yet agreed." During the argument in that case the learned Lord Justice had interposed this (1): "The phrase "'contract to enter into a contract' is not correct. It should "be 'contract to enter into an indeterminate contract.' The "court will enforce a contract to enter into a determinate "contract, as, for example, to renew a lease." Once the subject-matter of the agreement—that is, the lease to be given —becomes determinate there is no difficulty in law about it being enforced.

Lockett v. *Norman-Wright* (2) is, I think, of some help in this connection. There Tomlin J. was dealing with the same sort of question, whether correspondence constituted a binding contract. The words he was dealing with were the following, contained in a letter written by the defendant: "Confirming "my conversation over the telephone this afternoon, subject "to suitable agreements being arranged between your "solicitors and mine, and subject to your carrying out the "decorations of the top flat at your house, 117 Park Street, "W.1, ... I am prepared to take the flat for a period of" so long at such and such rent, and various other terms were mentioned. That was accepted, but the defendant tried to back out after the terms of the lease had been agreed. The question arose what the words "subject to suitable agreements "being arranged between your solicitors and mine" meant. To appreciate fully the passage in the judgment which I want to read I think I must first read part of the argument of Mr. Galbraith K.C. for the plaintiff. He said this in his reply (3): "The letter of February 26, 1924, was on its true "construction an agreement to take the sublease of the "premises subject to two conditions, both of which have been "complied with—namely, the arrangement between the "solicitors of the form of underlease and the carrying out "of the decorations." The same point arose in that case as arises here. One side was saying that the words

(1) [1924] 1 Ch. 100.

(2) [1925] Ch. 56.

(3) [1925] Ch. 60.

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"subject to suitable agreements being arranged between your "solicitors and mine" related to the agreement and not to what was to be done in pursuance of the agreement. Mr. Galbraith was arguing, as the defendants argue in this case, that the words referred to the form which the lease to be granted in pursuance of the agreement was to take. One would have thought that that was a very difficult argument in that case. In the course of his judgment Tomlin J. said (1): "The "plaintiff urges that the phrase here means: 'I agree to take a "'lease at the rent and for the term mentioned in the letter and "'upon such other terms as the solicitors of the parties may "'settle between themselves'; and that when once the draft "lease had been approved by the solicitors the condition was "fulfilled and there was an absolute contract. I do not think "I can place any such construction upon the language. I "think the natural meaning of the language is that the execution "of a suitable agreement or suitable agreements in a form "approved by the solicitors on both sides is a condition of any "concluded bargain." The learned judge there was dealing with just the sort of point with which I have to deal in this case, and in effect he says: "I cannot construe the "reference there to an agreement, as referring to what is to "be done under the agreement, the lease itself," clearly implying that, if he could, the agreement would have been enforceable when once the terms were agreed. That seems to me to be a very helpful case, because I am quite satisfied that the argument advanced by Mr. Galbraith does apply here with convincing force, and that the words which I have to consider refer, not to the agreement, but to something to be done in pursuance of it.

Then it is said for the plaintiffs that, even if the words do refer to the lease that has to be granted, the principle laid down in *Raingold* v. *Bromley* (1) would apply. It is argued that the words mean: "We agree to give you a lease as "drawn by our solicitors, but we are not to be bound so to do "until we have actually executed a lease," in other words: "We agree to do something, but we are not to be assumed to

(1) [1925] Ch. 60, 62.

(2) [1931] 2 Ch. 307.

"have agreed to do it until we have actually done it." That is a strange argument. People can make any agreement they like, however curious the terms, but, if the plaintiffs meant what is now suggested, it was their duty to make their meaning very plain. In this connection I want to hark back to something which Baggallay L.J. said in *Bonnewell* v. *Jenkins* (1): "The signature of such a contract may be made a condition "precedent to the existence of any binding bargain, but "the letter must be expressed in such a way as to show clearly "that such a condition is intended, and that is not the case "here."

In *Raingold* v. *Bromley* (2) the defendants had asked house agents to let certain premises, and the plaintiff had offered to take a lease. In reply the house agents had written: "Referring to our conversation this morning on the telephone, "we confirm that, subject to the terms of a lease, our client "is prepared to accept your offer." These were the words that were being construed. Everything was agreed, and then the defendant refused to execute the lease, taking up the position that the words "subject to the terms of a lease" meant "subject to the terms of a lease actually executed by "me and nothing is binding upon me until that lease is "executed." Lawrence L.J., trying the case as judge of first instance, decided that that was the intention of those words in that contract. The learned Lord Justice said (3): "This "may mean that the defendant is ready to accept the offer "subject to such terms as shall be contained in a lease when "it has come into existence and has been executed by him, "or it may mean that he is ready to accept the offer subject "to the terms of the proposed lease being agreed upon by the "parties, that is to say, subject to an agreement being come "to between the parties as to the terms to be contained in a "lease thereafter to be executed . . . . even if the alternative "construction"—that is, the second construction—"be the "right construction, there would obviously be no concluded "agreement until after the terms of the lease had been agreed

(1) 8 Ch. D. 74.
(2) [1931] 2 Ch. 307.
(3) [1931] 2 Ch. 315.

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"between the parties." The learned Lord Justice, as I have said, decided in favour of the first of the possible constructions —that there was to be nothing binding until the lease had been actually executed—but he clearly recognized that, if the second meaning had been the right one, it would have followed that when once the terms had been agreed there would have been a binding agreement. The wording of the agreement in the present case is far more favourable to the defendants. The words are "subject to the terms of a formal agreement to "be prepared by their solicitors." They seem to me to indicate how far the formal agreement has to go. The reference is not to a formal agreement executed by the plaintiffs, but to a formal agreement to be prepared by their solicitors. If the plaintiffs meant what they now contend, why talk about preparation ? Why not say "subject to our signing an agreement ? " and, here again, I have to bear in mind the other terms of the letter as to taking possession and the like.

It was then contended that there cannot be a binding agreement to grant a lease unless all the terms are already agreed. That is really over again the point that an agreement to make an agreement cannot be enforced. I do not think that argument is sound. You can have an agreement subject to a condition precedent, and, if the performance of the condition precedent creates that certainty which is required, that is sufficient. At any rate, the argument is contrary to what I find in Broom's Legal Maxims, at p. 422-3.

It was then said that there could not be an agreement unless the defendants bound themselves to accept the terms of a lease drafted by the plaintiffs' solicitors. It may very well be that they did so bind themselves, but I do not think I need consider that point because the defendants suggest an alternative meaning, and I think it is immaterial which alternative is right. They say that the letter of August 1 means : "We agree to give you the letting you want if your references "are satisfactory, but the lease must be in terms prepared "by our solicitor. If we approve your references you must "pay a quarter's rent in advance and you may go into "possession pending preparation of the lease. If you accept "the terms when you see them there will then be a concluded "bargain. If you do not accept those terms the matter is "off and you will have to vacate the premises." Whatever that offer meant, it was accepted by the defendants paying rent and going into possession. On the instructions of the plaintiffs their solicitors prepared and submitted a draft of the formal document and on August 20 it was accepted, because the three points which were raised were not in contradiction of anything contained in the formal lease, but were points which it is common ground had been previously agreed. To my mind, the parties were then at one and were within the words of Sir George Jessel M.R. in *Crossley* v. *Maycock* (1): "If there is a simple acceptance of an offer "to purchase, accompanied by a statement that the acceptor "desires that the arrangement should be put into some more "formal terms, the mere reference to such a proposal will not "prevent the court from enforcing the final agreement so "arrived at. But if the agreement is made subject to certain "conditions then specified or to be specified by the party "making it, or by his solicitor, then, until those conditions "are accepted, there is no final agreement such as the court "will enforce." That is exactly the case before me here. The agreement is subject to certain conditions to be specified by the solicitors to the plaintiffs, and once those conditions are accepted there is a final agreement which the court can enforce. The plaintiffs sought to incorporate in the lease something which was not in the draft and did not originate with their solicitors. The defendants might well have said: "You cannot do this," but Mr. Blochert, on their behalf, and Mr. Woolf, on behalf of the plaintiffs, agreed on a modified clause in lieu of the two added sub-clauses. That, I think, was a concession made by Mr. Blochert and the plaintiffs must be bound by what Mr. Woolf agreed. They had sent the altered draft to him to try to get it accepted. They had referred Mr. Blochert to Mr. Woolf when he mentioned the three minor points. Mr. Woolf certainly had apparent authority, but if he had no authority the defendants can rely on the draft sent to them which they accepted, and which did not contain the clause which they were ready to concede. As I have said, I have no doubt that the parties were then completely at one.

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(1) (1874) L. R. 18 Eq. 180, 181.

There is only one other case to which I desire to refer and that is *Chipperfield* v. *Carter* (1). The facts were not far removed from those in the present case. The headnote says: "By a letter which contained all essential terms of a contract, "the defendant offered to take a lease of a number of houses "from the plaintiff, but there was this provision at the end: "'Such lease to be approved in the customary way by my "'solicitor.' The offer contained in this letter was accepted "by the plaintiff. The defendant's solicitor subsequently "refused to approve the lease, or to complete." The question was whether there was a binding bargain and Wright J. held that there was. He began his judgment by saying: "One has, of course, very often had to consider cases of this "kind, or else I should have taken time to look over the "authorities on this point again. It is admitted that there "is no authority precisely in point upon these exact words. "Any opinion which I may express is certain not to be shared "by other authorities at least as competent as I am, and I do "not know what the final decision would be if the matter "were carried further. But, to my mind, the intention of the "parties is really plain." I adopt every word of that language. In my view, the intention of the parties was perfectly plain. Looking at the letter of August 1 as a whole, one sees that, as soon as the references were approved, the defendants were to be asked to pay a quarter's rent in advance; that, when that rent was paid, the plaintiffs were to give instructions for the necessary work to be done—a thing which they did; and that the defendants were then to enter into possession. It seems to me that it is more consistent with definite agreement than with negotiation.

The phrase in the letter, "to vacate when called upon "if no agreement is entered into," means, in my view, one of two things—either: "If this agreement, subject as it is to

(1) (1895) 72 L. T. 487.

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"two or more conditions precedent, never becomes effective "owing to non-performance of the conditions, you are to go "out"; or: "If you do not accept the terms drafted by our "solicitor, you must go out." I cannot persuade myself that the words mean: "You must undertake to go out, "although we have agreed on all the terms and although you "have accepted the formal agreement prepared by our solicitor, "if we change our minds and call on you to vacate, and that "we are free to do that right up to the moment of executing "the lease."

I find for the defendants in this case. They are not in my view tenants at will. I think that they are in the premises on the terms arrived at, and that they are entitled to specific performance of the lease. They agreed to accept the further clause which has been mentioned, and I think, therefore, that the safest form of decree would be for specific performance of the agreement as arrived at between Mr. Woolf and Mr. Blochert.

Judgment for defendants.

Solicitors for plaintiffs: *Nash, Field & Co.*
Solicitors for defendants: *Oscar Mason & Co.*

R. F. S.

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Dec. 9, 10, 15.

Landlord and tenant—Nuisance—Damage by rain-water—Tenant's shop part of building owned by landlords—Flow of water from roof under control of landlords—Provision for escape of water for common benefit—No negligence—Liability of landlords.

The plaintiff was the occupier of a shop which formed part of a building belonging to the defendants who had demised the shop to him. The shop was situated in an arcade, the glass roof of which was the property and under the control of the defendants. Rain-water from this roof ran into a gutter over the plaintiff's shop and was carried to the sewer by piping which ran down the side of the shop. Owing to an accumulation of rubbish in the piping rain-water escaped from the gutter, found its way into the plaintiff's shop, and damaged his stock. The defendants had made adequate arrangements for the inspection and cleansing of the gutter and piping, and there was no negligence on their part:—

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Held, that, in the absence of negligence, the defendants were not liable to the plaintiff in an action for nuisance for allowing the water to escape on to his premises as (1.) the plaintiff's shop formed part of a larger building belonging to the defendants and he must be held to have taken the shop as it was and could not complain that the building was not constructed differently; and (2.) the arrangements for the collection and carrying away of water from the glass roof to the sewer was for the joint benefit of both the plaintiff and the defendants.

Carstairs v. *Taylor* (1871) L. R. 6 Ex. 217 and *Ross* v. *Fedden* (1872) L. R. 7 Q. B. 661 applied and followed.

ACTION tried before Goddard L.J., sitting as an additional judge of the King's Bench Division.

By a lease dated July 8, 1936, the defendants demised to the plaintiff for a term of fourteen years a shop known as 125 Moorgate, in the city of London, situate on the south side of the covered archway or arcade known as Northern Arcade which connected Moorgate with Moorfields and on the ground floor of a block of buildings belonging to the defendants known as Moorgate Station Buildings. The lease reserved to the defendants the free passage or running of water and soil coming or to come from any other lands or buildings of the defendants adjoining or near to the demised premises in and through the channels, drains, sewers and water courses then belonging thereto or thereafter to be made. The glass roof over the arcade, half of which sloped towards the plaintiff's shop, was the property and under the control of the defendants. Rain-water from that half of the roof ran into a gutter which adjoined the soffit over the windows of the plaintiff's shop and was carried by a short length of almost horizontal piping into a vertical pipe which ran down the side of the plaintiff's shop and was thence discharged into the sewer. If either the vertical or the horizontal pipe became choked it was inevitable that water would rise in the gutter, and, as soon as it got above the flashings, would percolate into the plaintiff's shop. Up to the middle of October, 1940, a servant of the defendants, who lived on their premises, used to keep the gutter and pipes in order, making periodical inspections to see that they were unchoked, and only on one previous occasion had there been any trouble from choking. When the defendants' servant was called up for military service the defendants contracted with a firm of builders to make quarterly inspections of the roof and gutters. The first of those inspections was to have taken place in March, 1941, but on December 29, 1940, a fire occurred owing to hostile attack, with the result that masses of ash and debris were dispersed in all directions. The defendants' contractors paid several visits to the roof to clear it of the rubbish which fell on it, and their last visit before the events which gave rise to this action took place on February 24. On February 26 there was very heavy rain, and the plaintiff, on arriving at his shop on February 27, discovered that a considerable quantity of water had found its way in above the shop front and damage was done to his stock to the agreed amount of 105*l.* On complaint to the defendants the situation was quickly remedied, inspection showing that the horizontal pipe was blocked and the obstruction being removed by pushing a rod through the pipe. The plaintiff brought this action to recover from the landlords damages for the loss which he had sustained.

Astell Burt and *J. Davidson* for the plaintiff. The plaintiff is entitled to recover damages for the negligence of the defendants inasmuch as they did not make reasonable and adequate arrangements for the inspection and cleansing of the gutters and drains. The defendants are also liable to the plaintiff in nuisance for allowing the water from their gutters to overflow on to the plaintiff's shop: *Rylands* v. *Fletcher* (1). In *Tucker* v. *Newman* (2) it was held that building a roof with eaves which discharged rain-water by a spout into adjoining premises was an injury to the reversion for which the landlord of the adjoining premises might recover. In *Humphries* v. *Cousins* (3) the occupier of a house was held liable to the occupier of an adjoining house for the escape of sewage from a drain on his premises which flowed into the plaintiff's cellar doing damage. As stated by Blackburn J. in *Hodgkinson* v. *Ennor* (1), "you "must not injure the property of your neighbour, and, "consequently, if filth is created on any man's land, "then, in the quaint language of the report in Salk. "361, 'he whose dirt it is must keep it that it may not "'trespass.'"

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(1) (1868) L. R. 3 H. L. 330.

(2) (1839) 11 Ad. & E. 40.

(3) (1877) 2 C. P. D. 239.

Scott Cairns (for *J. P. Ashworth*, on war service), for the defendants, was asked to confine his argument to the liability of the defendants in nuisance. The proposition put forward on behalf of the plaintiff is not disputed, but it does not apply to the facts of the present case. The cases cited in support of that proposition dealt with the rights of the occupiers of adjoining premises, whereas the plaintiff's shop is not a property adjoining the premises belonging to the defendants, but forms part of the defendants' premises. In *Carstairs* v. *Taylor* (2) the plaintiff was the occupier of the ground floor of a warehouse, and the defendant was the occupier of the upper part. The water from the roof was collected by gutters into a box from which it was discharged by a pipe into the drains. A rat made a hole in the box, the water escaped and injured the plaintiff's goods, and it was held that the defendant was not liable for the damage. Bramwell B. pointed out (3) that the roof was the common protection of both parties, and the collection of the water running from it was for their joint benefit. That reasoning applies in the present case. Martin B. also said (4) "that one "who takes a floor in a house must be held to take the premises "as they are, and cannot complain that the house was not "constructed differently." In *Ross* v. *Fedden* (5) the plaintiff occupied for business purposes the ground floor, and the defendants the second floor of the same house. Without negligence on the part of the defendants, water percolated from a water closet on the defendants' premises to the plaintiff's premises and caused damage to his stock, but it was held that there was no obligation on the defendants to keep in the water

(1) (1863) 4 B. & S. 229, 241.
(2) (1871) L. R. 6 Ex. 217.
(3) Ibid. 222.
(4) L. R. 6 Ex. 222.
(5) (1872) L. R. 7 Q. B. 661.

at their peril, and that they were not liable to the plaintiff for the damage. In the absence of any negligence on the part of the defendants here they are not liable to the plaintiff as what was done was for the common benefit of both parties.

Davidson replied.

Cur. adv. vult.

1941. Dec. 15. GODDARD L.J. read a judgment in which he set out the facts, and continued: In view of the opinion which I have formed it is of importance to notice that the demise was of a shop which forms part of a larger building belonging to the defendants. On the facts I am quite unable to find that there was any neglect of duty on the part of the defendants. They had made reasonable and adequate arrangements for inspection and cleansing, and the roof had actually been inspected two days before the flood. So far as the plaintiff's case is based on negligence it fails.

It is, however, said that allowing the water to pour into the plaintiff's premises constitutes an actionable nuisance and that he is entitled to recover apart from negligence. At a very early period in our law it was held that it was an actionable nuisance to allow water from eaves or gutters to overflow on to a neighbour's house or land. This seems to have been first decided in an *Anonymous case* (1) reported in the Year Books of 18 Edw. 3 in 1344, being the first plea, reported on p. 22. I may say here that, through the courtesy of Mr. Riches, the Bar Librarian, not only was I able to see the original Year Book which is in Norman French, but he has also produced for me an English translation. This was assumed to be the law in *Reynolds* v. *Clarke* (2), the actual decision being that the action lay not in trespass but in case. So also in *Tucker* v. *Newman* (3). The principle is further illustrated by the well known case of *Humphries* v. *Cousins* (4). There a defendant was held liable for an escape of sewage from his premises into those of his neighbour, the sewage being due to a broken pipe, and it was held that his liability arose apart from negligence which had been expressly negatived by the verdict.

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(1) (1344) Y. B. 18 Edw. 3, 22 [B] 1.

(2) (1722) 1 Str. 634.

(3) 11 Ad. & E. 40.

(4) 2 C. P. D. 239.

But all these cases arose between adjoining owners whose holdings were entirely independent the one of the other. There is another line of authority which has to be considered where the water has escaped from a place where it has been brought with the consent or for the common benefit of both parties. I need refer to no more of the cases than *Carstairs* v. *Taylor* (1); *Ross* v. *Fedden* (2), and *Cockburn* v. *Smith* (3). It is now settled law that where the plaintiff and the defendant occupy parts of the same building, whether it be two floors of a warehouse, two sets of offices, or two flats, and water which is laid on to the building escapes and does damage, the person from whose part the escape takes place is not liable in the absence of negligence. The reason for the escape is immaterial as long as the exercise of reasonable care would not have prevented it, and it seems to me that the true reason is most clearly stated in the judgment of Martin B. in *Carstairs* v. *Taylor* where he says (4): "Now, I think that "one who takes a floor in a house must be held to take the "premises as they are, and cannot complain that the house "was not constructed differently." So here the plaintiff has taken part of the defendants' premises with a sloping roof outside down which rain must run to the gutter provided to carry it off, and it, therefore, follows that, if the flooding from the gutter occurred without negligence on the part of the landlords, the latter are not liable. Indeed, I think the same results would follow if A, being the owner of two adjacent houses, lets one to B, and the construction was such that rain-water must flow from the house retained by A on to that let to B, or into a gutter designed it may be for the express purpose of catching the water before it got on to the demised premises. B takes the property as he finds it and must put up with the consequences. It is not to be supposed that the landlord is going to alter the construction, unless he consents to do so. He would say to his intending tenant: "You must take it as it is or not at all." [1]

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(1) L. R. 6 Ex. 217.

(2) L. R. 7 Q. B. 661.

(3) [1924] 2 K. B. 119.

(4) L. R. 6 Ex. 222.

So, here it was obvious that water would run off the roof towards the plaintiff's shop. The gutters and pipes were there to carry it off, and the plaintiff has a right to require the defendants to use reasonable care to prevent the gutters and pipes becoming choked. But the defendants' duty is not absolute. It is only to use reasonable care, and for the misfortune that has happened in this case they are not liable. There must be judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for plaintiff: *H. B. Wedlake, Saint & Co.*
Solicitors for defendants: *Herbert Smith & Co.*

R. F. S.

TRAFALGAR INSURANCE COMPANY, LIMITED *v.* McGREGOR AND ANOTHER.

C. A.
1941
Nov. 17.

Insurance (Motor)—Third-party risks—Avoidance of policy—Non-disclosure and false representation—Order for particulars—Inability of insurers to comply — Order precluding insurers from giving evidence —Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-s.* 3.

In a proposal for motor insurance M. disclosed the existence of only two convictions against him of motoring offences. M. having subsequently been involved in an accident causing personal injury to S., who claimed damages, the insurers began an action against M. under s. 10 of the Road Traffic Act, 1934, for a declaration that they were entitled to avoid the policy for non-disclosure and misrepresentation, alleging that M. had been convicted of a number of motoring offences. S. was made a defendant to the action, and asked for particulars of the alleged convictions of M. On a motion for judgment by the insurers against M. in default of defence, Charles J. ordered (inter alia) that the defence of S. should be delivered within ten days after the delivery of the particulars asked for but no time limit was set for the delivery of the particulars. The insurers, despite their best endeavours, were unable to obtain the information required, and the particulars were not delivered. Eighteen months later, Lewis J., on the application of S., made an order precluding the insurers from giving evidence at the trial in support of the alleged convictions of M., subject to the direction of the judge at the trial:—

Held, that the order was right, since, if insurers who sought to avoid a policy were unable to prove their case, it was their misfortune, but no reason for postponing the rights, if any, of a third party. Where no time is limited for delivery of particulars, a reasonable time must be implied, and on the facts it had elapsed.

Appeal from Lewis J. in chambers.

On January 27, 1937, a proposal for motor insurance was made to the plaintiffs, Trafalgar Insurance Co., Ld., by the first defendant, Francis McGregor. In answer to question 5 (*a*) in the proposal form: " Have you . . . . ever been convicted, "or charged with any offence in connection with a motor "vehicle? (*b*) Has your . . . . licence been endorsed "suspended or revoked? (*c*) If so, state dates and reasons," he stated: " (*a*) Yes. (*b*) Yes. (*c*) 1918. Six months' "suspension, Rugby (speed). 1936. North London. Exceeding "speed limit, 37 m.p.h." On this proposal the plaintiffs issued a policy, the precise terms of which are not material, and it was renewed in 1938 and 1939. In 1939, while the insurance was in force, the first defendant was involved in an accident which caused personal injury to the second defendant, Miss Carrington Smith, who began an action against him for damages. On October 4, 1939, within three months after the commencement of the second defendant's action, the plaintiffs issued a writ against the first defendant claiming a declaration under s. 10, sub-s. 3, of the Road Traffic Act, 1934 (1), that they were entitled to avoid the policy on the ground that it was obtained by the non-disclosure of material facts. Notice of this action was given to the second defendant, and on February 2, 1940, the plaintiffs delivered their statement of claim, of which the following paragraph is material: "5. In truth and in fact he [the first "defendant] had suffered the following convictions and/or "penalties—(*a*) between 1915 and 1918 he had been several "times convicted for exceeding the speed limit; (*b*) 1936, "convicted and fined 1*l.* and licence endorsed for exceeding "speed limit at South London police court; (*c*) 1937, convicted and fined 2*l.* and licence endorsed for exceeding speed "limit, Chesterfield police court." On March 6, 1940, the second defendant was added, under s. 10 of the Road Traffic Act, 1934, as a defendant to the action, and on the same day the plaintiffs gave notice of motion for judgment in default of defence against the first defendant. On March 11, the solicitors of the second defendant wrote to the plaintiffs' solicitors requesting further and better particulars of para. 5 of the statement of claim. On March 15, the motion for judgment came on for hearing before Charles J. who made the following order: "That this motion do stand adjourned until "the trial of this action. That the plaintiffs do have leave to "amend the statement of claim herein, that the amended "statement of claim be delivered within 28 days, that the "defence of Carrington Smith be delivered within 10 days after "delivery of the particulars asked for in the letter dated "March 11, 1940, and that the costs be reserved to the trial." No time for delivery of the particulars was limited in the order. The plaintiffs then obtained leave to interrogate the first defendant and the interrogatories were served on him, but he returned no answers. A motion for attachment was adjourned sine die for want of service, the first defendant having joined the army and his whereabouts being unknown. Inquiries

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(1) By Road Traffic Act, 1934, s. 10, sub-s. 3: " No sum shall be "payable by an insurer under the "foregoing provisions of this section, if, in an action commenced "before, or within three months "after, the commencement of the "proceedings in which the judgment was given, he has obtained "a declaration that, apart from "any provision contained in the "policy, he is entitled to avoid it "on the ground that it was "obtained by the non-disclosure "of a material fact, or by a "representation of fact which was "false in some material particular ". . . . Provided that an insurer "who has obtained such a declaration as aforesaid in an action "shall not thereby become entitled to the benefit of this subsection as respects any judgment "obtained in proceedings commenced before the commencement of that action, unless

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"before or within seven days after "the commencement of that action "he has given notice thereof to "the person who is the plaintiff "in the said proceedings specifying "the non-disclosure or false representation on which he proposes to rely, and any person to "whom notice of such an action is "so given shall be entitled, if he "thinks fit, to be made a party "thereto."

from the police in the towns where he was believed to have been convicted met with the reply that it was not the practice to disclose the particulars of convictions to third parties. The particulars not having been delivered, the second defendant applied on July 31, 1941, for an order that the action be dismissed with costs on the ground that the plaintiffs had failed to comply with the order of Charles J. Alternatively, it was asked that para. 5 of the amended statement of claim be struck out, the plaintiffs having failed to deliver particulars thereof, and, in the further alternative, that the plaintiffs be precluded from giving evidence at the trial in support of any of the allegations contained in para. 5 on the ground that they had failed to comply with the order. Master Horridge refused to make any order, but Lewis J. made an order in the third alternative, subject to the direction of the judge at the trial. The plaintiffs appealed by leave of Lewis J.

Fox-Andrews for the plaintiffs. The order of Lewis J. is wrong. The plaintiffs have not failed to comply with the order of Charles J. As the defendant admits, they have done everything in their power to comply with it, but have failed to get the information required. The only thing they can do now is to subpœna witnesses from the various police courts to give evidence at the trial, and they ought not to be precluded from doing so except at the discretion of the judge. The position brought about by Lewis J.'s order is a deadlock. The plaintiffs cannot deliver particulars and the second defendant must plead in the dark as to the strength of their case. If the judge were asked at the trial to admit the evidence the second defendant would doubtless oppose that request. The right course is to leave the plaintiffs to call evidence if they can, subject to the second defendant's right to ask for an adjournment if she is taken by surprise. As no time was named for the delivery of the particulars, a reasonable time is implied, and in the circumstances a reasonable time will not have expired until the plaintiffs have had an opportunity to obtain on subpœna the evidence which they cannot get otherwise.

The first defendant did not appear.

G. O. Slade for the second defendant, was not called on to argue.

MACKINNON L.J. Mr. Fox-Andrews has contended that the plaintiffs have not failed to comply with the order made by Charles J., but, in my view, they have done so, for the order was, not that they should do their best to give particulars, but that they should give particulars. It is true that no time limit was specified for that purpose, but it is clear that a reasonable limit must be implied. Eighteen months have elapsed since the order was made and no particulars have been given. Mr. Fox-Andrews says that the order is very hard on the plaintiffs because they find it extremely difficult to give the particulars, but we are concerned with this very special provision in s. 10 of the Road Traffic Act, 1934, which makes an insurance company liable unless it can discharge the burden of setting aside the policy in an appropriate form of action. I do not think it would be right to give the plaintiffs any further licence to postpone the rights against themselves of the second defendant, if they exist. In my opinion, the order of Lewis J. was correct and we ought to affirm it.

GODDARD L.J. I agree. I do not think that there is any hardship or injustice in the position of the plaintiffs. Parliament has enacted that every motorist shall be insured against third party risks, so that, if a person is injured by a motor-car through no fault of his own, he will have an insurance company to look to for damages and will not have to rely on an individual defendant. Parliament has given an insurance company one loophole by providing that, if it can get the policy set aside in certain circumstances, it shall not be liable to compensate the injured person, but it is for the company to get the policy set aside if it can, and not for the injured person to help it to do so. If the plaintiffs cannot make out a case for setting this policy aside, that is their misfortune, but I do not see why it should indefinitely hinder the enforcement of the

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Trafalgar Insurance Co. v. McGregor.

second defendant's rights, if any. In my opinion, the order made by Lewis J. was right. It is open to the judge at the trial to admit evidence if he thinks it right to do so and on such terms as he thinks fit to impose. I say nothing with regard to that, for in my view, we should not fetter his discretion in any way.

Hallett J. I agree. It must not be overlooked that the rights of third parties, as is clear from s. 10 of the Road Traffic Act, 1934, arise as soon as the insurance company has delivered a certificate of insurance to its assured. At one time it was sought to be argued that insurers who had issued such a certificate were precluded from denying that the holder of the certificate was in fact insured, but the legislature has now enacted that subject to the limitations which it has prescribed, insurers can be heard to say that they have not effectively done that which they have purported to do. I agree that the loophole which the legislature has thought it right to provide should not be enlarged by the court.

Appeal dismissed.

Solicitors for appellants: *Stanley & Co.*
Solicitors for respondents: *Wood & Sons.*

J. W. H.

THE KING *v.* WANDSWORTH JUSTICES.

1941
Nov. 25.

Ex parte READ.

Certiorari—Conviction by justices—Denial of natural justice—Appropriate remedy—Affidavit in support of application—Admissibility.

Where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by case stated or appeal to quarter sessions, but by application to the High Court for an order of certiorari to remove and quash the conviction.

On such an application the court, to ascertain the facts, will look at affidavit evidence filed in support of the application.

APPLICATION for an order of certiorari.

Two summonses were preferred before Wandsworth justices by the inspector of weights and measures for the county of London against the applicant, Henry Read, a butcher, charging him with having misrepresented by means of tickets the weight of certain meat which he offered for sale. At the hearing of the summonses the tickets were not produced, and, the applicant's counsel having objected to their absence, the solicitor representing the inspector agreed that the question whether or not the absence of the tickets had been satisfactorily accounted for should be treated as a preliminary issue in the proceedings to be decided before determination of the summonses on their merits. The justices, having heard evidence and arguments, withdrew to consider the matter. On their return after a considerable time, the chairman announced that the applicant was acquitted on one summons and convicted on the other and a fine of 10*s.* was imposed. The applicant obtained leave to make this application for an order of certiorari to remove the conviction into the court that it might be quashed. The facts already stated were set out in an affidavit in support of the application sworn by the applicant's solicitor.

Tolstoy for the applicant. The justices convicted without hearing the evidence for the applicant, and, further, the tickets which were said to show the false weights were not produced by the prosecution. There was a denial of natural justice, and the application for certiorari should be granted.

Herbert Malone for the justices. On an application for certiorari the court will not take cognizance of extrinsic evidence contained in an affidavit filed in support of the application. An order for certiorari will only be made where there is an error appearing on the face of the order which it is sought to quash: *Rex* v. *Cambridgeshire Justices* (1); *Rex* v. *Nat Bell Liquors, Ld.* (2); Short and Mellor's Practice of the Crown Office, p. 47. There is no such error patent here. Secondly, while there was obviously a mistake by the justices, the remedy which is open to the applicant is not to apply for certiorari. It is by appeal, either to quarter sessions or to the High Court on a case stated.

Bryant for the London County Council. Lack of evidence sufficient to convict is not a ground for an order of certiorari. The only grounds for this are either want of jurisdiction or error on the face of the record.

VISCOUNT CALDECOTE C.J. [after stating the facts:] It is admitted that the justices did not give the applicant an opportunity to offer any defence to the charge made against him, and by their counsel they have informed the court that they do not dispute that they made an error. That must be taken as an admission that there was a denial of natural justice to the applicant, but the justices contend that this court has no power to correct the mistake. The argument appears to be based, first, on the submission that the court will not look at what is called extrinsic matter which comes before it on affidavit. Secondly, it is argued that an order of certiorari should not issue because the applicant's remedy was by appeal to quarter sessions or by appeal to this court by case stated on a point of law, and that he has lost his opportunity of appealing because he is out of time.

Rex v. *Nat Bell Liquors, Ld.* (2) is relied on as authority for a proposition which must be put as high as this, that where a person charged in an inferior court has not been

(1) (1835) 4 Ad. & E. 111, 122.

(2) [1922] 2 A. C. 128.

given an opportunity to call evidence on his own behalf an order of certiorari will not be granted by this court to quash his conviction because the position is analogous to that which exists where there has been full opportunity to all concerned to produce their evidence but the evidence for the prosecution is insufficient to justify a conviction. Counsel referred to the following passage in Lord Sumner's opinion in that case (1): "It has been said that the matter may be regarded as a "question of jurisdiction, and that a justice who convicts "without evidence is acting without jurisdiction to do so. "Accordingly, want of essential evidence, if ascertained "somehow, is on the same footing as want of qualification in "the magistrate, and goes to the question of his right to enter "on the case at all. Want of evidence on which to convict "is the same as want of jurisdiction to take evidence at all. "This, clearly, is erroneous. A justice who convicts without "evidence is doing something that he ought not to do, but "he is doing it as a judge, and if his jurisdiction to entertain "the charge is not open to impeachment, his subsequent "error, however grave, is a wrong exercise of a jurisdiction "which he has, and not a usurpation of a jurisdiction which "he has not." That passage does not deal with a case such as the present where there has been a denial of justice to a party who has been convicted.

The court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction. Notwithstanding the argument of counsel for the justices that an affidavit is not necessary even in a case of want of jurisdiction, I am clearly of opinion that even in such a case

(1) [1922] 2 A. C. 128, 151.

Viscount Caldecote C.J.

an affidavit can be looked at, and that also in this case, which is not one of want of jurisdiction but is analogous to it, the court will look at the affidavit to see what the facts are. If it appears that there has been a denial of natural justice, the court will interfere and order that the conviction shall not stand.

It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the court should be debarred from granting his application. It has been admitted by the justices that a mistake was made. This court is in a position to remedy that mistake by making an order of certiorari to quash the conviction, and that is the order which this court should make.

Humphreys J. I am of the same opinion. If a person can satisfy this court that he has been convicted of a criminal offence as the result of a complete disregard by an inferior tribunal of the laws of natural justice, he is entitled to the protection of the court. I entirely agree with my Lord's description of the proceedings before the justices here as a denial of justice to the applicant who was prevented from taking any part in any discussion, if there were any, regarding the rights or wrongs of the matter and was never heard in his own defence.

The only question which remains is whether there is some other remedy which, in the language in Short and Mellor's Practice of the Crown Office, is "equally convenient," because there is ample authority for saying that this court will not grant writs of certiorari or mandamus where there is some other course equally convenient open to the applicant for the writ. For the reasons which my Lord has stated it must be apparent on the facts of this case that the remedy by case stated was not available. It would be ridiculous to state a case on the only question of law which arose. In my opinion, this is also not the type of case which was intended to be the subject of an appeal to quarter sessions. Quarter sessions may, it is true, hear appeals on questions of law, but that court primarily exists in its appellate jurisdiction to deal with disputed questions of fact. The applicant, having come before quarter sessions, would have said: "I appeal "against my conviction. I do not know why I was convicted. "I cannot say that any wrong evidence was heard because "no evidence was given. My real complaint is that I do not "know any of these things and that I was never heard." That would be the only matter which would come before quarter sessions. The standpoint of the London County Council, the prosecutors, is that if the applicant had appealed to quarter sessions, they would have had the opportunity to put their house in order and to give the evidence which they did not attempt to give before the justices. There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal at which, it may be, the necessary evidence will be adduced. He is fully entitled to come to this court and maintain, on precedent and on authority, that he was convicted as the result of a denial of justice, and that he is entitled to justice, which can only be done by the quashing of his conviction.

WROTTESLEY J. I agree.

Order absolute.

Solicitors for applicant: *W. T. Ricketts & Son.*

Solicitors for respondents: *Wetherfield, Baines and Baines; J. R. Howard Roberts.*

F. P. F.

1941
Nov. 26 ;
Dec. 8.

SEA AND LAND SECURITIES, LIMITED *v.* WILLIAM DICKINSON AND COMPANY, LIMITED.

Shipping—Charterparty—Time charter—Withdrawal of ship to fit degaussing apparatus—Charterer's right to withhold hire.

During the currency of a six months' time charter the shipowners withdrew the ship for ten days to fit her with degaussing apparatus :—

Held, that the charterers were entitled to withhold hire in respect of the period of withdrawal.

Case stated by umpire.

On October 23, 1939, the charterers, William Dickinson & Co., Ld., hired the steamship *Alresford*, belonging to Sea and Land Securities, Ld., on time charter "for six calendar months "from the time the steamer is delivered and placed at the "disposal of the charterers ready to load." The charterparty contained (inter alia) the following provisions: Cl. 2 "The "owners shall provide and pay for all the provisions and wages, "and for the insurance of the steamer, and for all deck and "engine-room stores, and maintain her in a thoroughly efficient "state in hull and machinery for and during the service." Cl. 12 : "In the event of loss of time from deficiency of men or "owner's stores, breakdown of machinery, or damage to hull or "other accident preventing the working of the steamer, and "lasting more than twenty-four consecutive hours, the hire "shall cease from the commencement of such loss of time until "she be again in an efficient state to resume her service ; but "should the steamer be driven into port or to anchorage by "stress of weather, or from any accident to the cargo, or in "the event of the steamer trading to shallow harbours, rivers "or ports where there are bars causing detention to the "steamer through grounding or otherwise, time so lost and "expenses incurred (other than repairs) shall be for charterers' "account." Cl. 14 was an exceptions clause in common form which contained no mention of degaussing. Cl. 18 : "Should "the steamer be lost or missing, the hire shall cease from the "date when she was lost or last spoken, or if not spoken, then "from the date when last seen, and hire paid in advance and "not earned shall be returned to the charterers."

On March 19, 1940, the ship, which had been sub-let by the charterers, put into Blyth to load, and, as it was known that there would be delay in doing so, at the suggestion of the charterers the owners took the opportunity to fit her with degaussing apparatus as a protection against mines, she being occupied thereby for 10 days, 10 hours and 45 minutes. The charterers could have earned freight during this time if the ship had been available. Degaussing was not compulsory, but it was strongly recommended by the government. The charterers claimed that during the degaussing period the *Alresford* was off hire, and they withheld 1083*l.* 19*s.* 4*d.*, a proportionate part of the hire, contending that there was an interruption of the contract as the vessel had been withdrawn from their use during that period by the owners. The owners contended that hire was payable throughout the whole contract period, but that, if the withdrawal constituted a breach of contract, the remedy lay in damages. The umpire upheld the contention of the charterers, but stated this case for the opinion of the court.

A. W. Roskill for the owners. Unless relieved by the terms of the charterparty, hire continues to be payable throughout the chartered period: Scrutton on Charterparties, 14th ed., p. 425; Carver on Carriage by Sea, 8th ed., sect. 572. No term of this charterparty operated to relieve the charterers. Halsbury's Laws of England, 2nd ed., vol. xxx., p. 309, differs from the text-book writers mentioned by saying that hire is not payable if the delay is attributable to the owners' default, but no authority supports that proposition. Delay caused by a breach of the contract by the owners would not put the vessel off hire, but it might give a right to damages. There was no breach by the owners of the obligation to maintain, for maintenance predicates a previous condition in the ship of having been degaussed. There was in fact no loss of time, for the vessel was waiting to load. [*Modern Transport*

Co., Ld. v. *Duneric Steamship Co.* (1); *Hogarth* v. *Miller, Brother & Co.* (2); *Bentsen* v. *Taylor, Sons & Co.* (3); and *Brown* v. *Turner, Brightman & Co.* (4), were referred to.]

A. J. Hodgson for the respondents. The award can be supported on three grounds: (1.) The fact that during the degaussing the vessel was not at the disposal of the charterers was due to the act of the owners. Abbott's Law of Merchant Ships, 14th ed., takes a view different from that of the other text-book writers, and says (p. 679) that hire continues "during all unavoidable delays not occasioned by the act or "neglect of the owners." This loss was caused by the deliberate act of the owners in delaying the ship for degaussing. (2.) Degaussing apparatus is "stores," and its absence was a "deficiency" within cl. 2 and cl. 12 of the charterparty, and no hire was payable until the deficiency was made good by the owners. This apparatus was necessary to the ship's navigation from a practical point of view. In *Price* v. *Noble* (5) ship's guns were held to be stores. Degaussing apparatus is part of the ship's tackle. [*The Nicolay Belozwetow* (6) and *Radcliffe & Co.* v. *Compagnie Générale Transatlantique* (7) were also referred to.] (3.) The sum awarded by the umpire was damages for the loss to the charterers (i.e., the amount of hire while they were without the use of the ship) which resulted from the owners' breach of contract.

Roskill in reply. In *Aktieselskabet "Lina"* v. *Turnbull & Co.* (8) it was held that charterers were liable for hire while the ship was in quarantine. [*Burrell & Sons* v. *F. Green & Co.* (9) was also referred to.]

Cur. adv. vult.

1941. Dec. 8. ATKINSON J. [after stating the facts:] Is it the law that a charterer has to pay hire to the owners of the ship he charters in all circumstances except in so far as payment is expressly excused by a term in the charterparty?

(1) [1917] 1 K. B. 370, 373.
(2) [1891] A. C. 48.
(3) [1893] 2 Q. B. 274.
(4) [1912] A. C. 12.
(5) (1811) 4 Taunt. 123.
(6) [1913] P. 1, 5.
(7) (1918) 24 Com. Cas. 40.
(8) 1907 S. C. 507.
(9) [1914] 1 K. B. 293.

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SEA AND LAND SECURITIES, LD.
v.
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Atkinson J.

There is a sharp difference of opinion between text-book writers on the matter even if the ship is deliberately withdrawn from the use of the charterer in breach of contract. This passage was read to me from Scrutton on Charterparties, 14th ed., p. 425: "Except as specially provided by such a "clause, hire continues to be payable throughout the chartered "period. The charterer cannot rely on an excepted peril as "excusing him from paying hire during time in which by such "excepted peril he is unable to use the ship." Then I was referred to Carver on Carriage by Sea, 8th ed., sect. 572. The sidenote is: "Time occupied in repairs not deducted unless so "stipulated." The paragraph says: "The same is true of other "detentions which may occur. If they arise owing to defaults "of the shipowner, there may be a counterclaim against him; "but in the absence of agreement to the contrary, the time "for which the freight is to be paid runs without a break, "from the beginning to the end of the agreed voyage or service." That is very clear language. On the other hand, I was referred to Abbott's Law of Merchant Ships. I have seen the last edition (14th ed.) of that book, and I have in front of me the edition which was published by Sir Charles Abbott in 1812, and the language used is the same in that edition as in the last. What I see there is this (p. 679): "In all the "instances before mentioned, the owners take upon themselves "the chance of the long or short duration of the voyage. But "if the merchant engage to pay a certain sum for every month, "week, or other portion of the voyage, in this case the risk of "the duration falls upon the merchant; and if no time be "fixed for the commencement of the computation, it will begin "from the day on which the ship breaks ground and commences the voyage, and will continue during the whole course "of the voyage, and during all unavoidable delays not occasioned by the act or neglect of the owners or master, or by "such circumstances as work a suspension of the contract "for a particular period." In Maude & Pollock on Merchant Shipping, 4th ed., vol. i., p. 378, there is this: "Questions "have arisen as to the effect of a detention during the voyage "on the claim for freight where it is to be paid at so much for "a given time, as, for instance, at so much per month. The "determination of these cases depends also upon the terms of "the contract. The general rule is, that the freight continues "payable, if the detention does not defeat the object of the "voyage, or suspend the contract, and does not proceed from "the default of the shipowner." Halsbury's Laws of England, 2nd ed., vol. xxx., p. 309, comes down on the side of the last two authorities: "If, however, the ship is not lost, but merely "delayed, the hire continues to be payable (in the absence of "a stipulation to the contrary), notwithstanding the loss of "time, unless the delay is attributable to the shipowner's "default, or the charterparty expressly provides for cesser of "hire during delay due to the cause in question, or the delay "is such as to frustrate the contemplated adventure, without "the fault of either party."

Three text-book writers, therefore, indicate that, if the withdrawal from hire and inability to use the ship are due to the act of the owner, hire ceases to be payable. It is not easy to determine whether the use of a ship is a condition precedent to liability for hire, and the principle by which the difficulty is to be solved appears in a passage in Maude & Pollock on Merchant Shipping, 3rd ed., p. 235; 4th ed., vol. i., p. 299, which was cited with approval by Lord Blackburn in *Inman Steamship Co., Ld.* v. *Bischoff* (1): "It is often difficult in construing charterparties to ascertain "whether particular stipulations amount to conditions prece-"dent. This is to be determined by seeking for the intention "of the parties as apparent on the instrument, and from the "surrounding circumstances, and by applying the ordinary "rules of construction to each particular case. It does not "depend on any formal arrangement of the words, but on the "reason and sense of the thing as it is collected from the whole "contract. Generally speaking, any stipulation which goes "only to a portion of the consideration, or, in other words, "the breach of which would deprive the party who has a right "to insist upon it of a portion only of the benefit of his contract, "will be construed not to be a condition precedent. It must,

(1) (1882) 7 App. Cas. 670, 684.

"however, be recollected that this rule although a very useful "one, is only a rule of construction, or means of discovering "the intention of the parties, to be applied where the words "will bear either sense. For it is clear that the courts will "not make contracts for the parties, and that if they use "language which distinctly shows that they intend such a "stipulation to be a condition precedent, it will be so construed. "Constructions, however, leading to absurd and unreasonable "results will be avoided, if this can be done without violence "to the terms used, because, where the intention is not clearly "expressed, the parties are not presumed to have meant to "make an absurd or unreasonable contract."

Reading the contract with that in mind, it seems to me that cl. 12 gives a very clear indication of the intention of the parties. Under that clause any loss of time due to breakdown of machinery, or damage to hull or other accident preventing the working of the steamer would lead to the ship being off hire. On the other hand, the latter part of the clause indicates that where the accident is due to the charterers having chosen shallow harbours, rivers or ports which cause detention to the ship they are to continue liable. If the use of the ship was to be deemed a condition precedent to the payment of hire where the loss of the use was due to an accident, even an accident for which the owners were in no way to blame, I think that, a fortiori, that must have been the intention if the ship should be withdrawn by the owners for their own purposes.

If the withdrawal had been something forced on the owners by law, the case of the charterers would be more difficult. As to that the umpire finds : "The fitting of the said apparatus "was not then compulsory. There was, however, a strong "obligation on the owners to present the vessel for the fitting "of the said apparatus because a memorandum issued by the "Admiralty on January 20, 1940, gave details of this device. "This memorandum was circulated on January 22, 1940, by "the war risks associations, and in the first paragraph this "circular stated as follows : 'In view of the serious loss "'suffered by enemy action of this nature, you will no doubt "'take steps to have your ships fitted with the device in "'question at the earliest opportunity.'" The memorandum goes on to describe a scheme created by the Merchant Shipping Defensive Measures Expenses Committee which provided for compensation being paid to owners for the time lost by a ship in having work of this sort done. I do not think the existence of that scheme can affect the question which I have to determine, but it is clear that the withdrawal by the owners was for their benefit and for the safety of their ship, and must be regarded as a withdrawal for their own purposes. The arbitrator has found that although the charterers consented to the withdrawal, it was not on the basis of continuing liable for hire. So much for the inferences which I should be inclined to draw from the terms of the charterparty.

I turn to the cases which have been cited to see which of the views expressed in the text-books is the better supported by authority. The first is *Havelock* v. *Geddes* (1), where a ship had been let for freight for twelve months, and the point was whether freight ceased to be payable while certain repairs were being effected. Lord Ellenborough in his judgment said (2): "The question then is, whether, because the plaintiff "[the shipowner] has undertaken to keep the vessel tight, etc., "the defendants [the charterers] have a right to deduct anything "out of the freight they are to pay, in respect of the time which "may be taken up in making good such defects as may occur "during the period for which the vessel is hired? And we "are of opinion they are not. From the accidents to which "ships are liable, it was in the ordinary course of things to "expect that this ship might want repairs in the course of "her voyage; and when the defendants were making their "bargain, they should have stipulated to deduct for the time "which might be exhausted in making those repairs, if they "meant to make that deduction. Without such a stipulation, "we think the true construction of the charterparty is, that "whilst those repairs are going on, the ship is to be considered "as in the defendants' service, and the defendants liable to "continue their payments. As these pleas therefore do not

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(1) (1809) 10 East. 555.

(2) Ibid. 566.

"shew that it was owing to any default in the plaintiff, that "the defect in the ship occurred, or that there was any delay "in repairing it; we are of opinion that no deduction is to be "made from the freight on that account; that these pleas "therefore are bad, and that the demurrer to them must be "allowed." That appears to me to indicate that, if the time lost had been due to any default in the plaintiff or to some delay on his part in repairing, the hire would not be payable for the period in question. Certainly, I can find nothing there to support the principle for which the ship contends in this case, namely, that, come what may and whatever the circumstances may be, hire is payable. The case seems to me to support the opinions expressed in Abbot and Maude & Pollock, and is, indeed, one of the authorities on which they rely for their statement that, if the charterer is deprived of the use of the ship owing to some act on the part of the owner, hire is not payable.

The next case is *Wehner* v. *Dene Steam Shipping Company* (1), where the plaintiffs were sub-charterers of a steamship belonging to the defendants which had been chartered by them on a time charter to the William Brauer Steamship Company. The defendants, by exercising certain rights of lien, had in their possession a sum of 800*l.* which prima facie belonged to the plaintiffs who were the owners of the cargo. The hire was for 1100*l.* a month and was payable on the 9th and 23rd of each month in advance. At noon on December 23, 1902, the sum of 550*l.* became payable for hire by the William Brauer Steamship Company to the defendants. It was not paid, and on the following day the defendants re-took possession of the ship as they were entitled to do under the terms of the charterparty, and they claimed to retain the 550*l.* out of the 800*l.* The defendant owners contended, as here, that hire was payable throughout the whole term of the contract, that they were exercising their rights in withdrawing the ship when they did (which was not challenged), and that they were, therefore, entitled to the whole of the 550*l.* Channell J. decided that that was not so, but that they were only entitled

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(1) [1905] 2 K. B. 92.

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to deduct from the 800*l.* the sum of 35*l.* attributable to one day, from December 23 to December 24. He said (1): "The "defendants can now in any case only assert a right to a very "small part of the 550*l.* When that sum did become due at "noon on December 23, it was due as a payment in advance, "and if it was not paid the defendants were entitled, under "the time charterparty, to resume possession of their ship. "On December 24 they did in fact retake possession. It is "true that the charterparty provides that the right to retake "possession was to be without prejudice to their other rights; "but I do not think that that would give the owners the right "to retake possession in the middle of a half-month, and also "to claim the hire for the whole of that period. I think that "Mr. Leck was right in saying that the consideration had "either wholly or partially failed, and that the defendants "could only claim hire in respect of that portion of the half-"month during which the charterers actually had the use of "the vessel. The half-month in question commenced at "noon on December 23, and there was only one day's "use of the vessel after that time in respect of which the "defendants can claim hire." Channell J. took the view that, even where the ship was withdrawn as of right, there was a failure of consideration and hire was not due for the period for which it was withdrawn. Why should not the same result follow when a ship is withdrawn in breach of agreement? If in the present case the degaussing had been done in the last ten days of the six months, Mr. Roskill's argument would have been the same, but the case would have been on all fours with *Wehner* v. *Dene Steam Shipping Company* (2). Indeed, it would have been an a fortiori case, and the hire would not have been payable. Why should a different principle apply because the ten days here came somewhat earlier in the period of the charter? In *Aktieselskabet "Lina"* v. *Turnbull* (3) the point argued was whether or not a ship was off hire while she was in quarantine in a port. If Mr. Roskill's contention were right, it would have been easy to say: "What is there to discuss? Hire is payable "throughout the time and there is an end of it." Lord Stormonth-Darling, however, said (1): "The second question "depends on the terms of the charterparty and on the "ordinary rules of maritime law. Both Sheriffs lay stress on "this being a time charter, and in my opinion that affords a "sufficient ground of judgment. The owners had no voice "in the question as to what ports (within the defined limits) "their ship was to be sent to, and the correlative of that "was that hire should go on at a certain rate so long as they "continued to furnish a seaworthy ship capable of performing "its stipulated service. Quarantine may or may not be a "'restraint of princes and rulers,' but even if it is, and as "such is 'mutually excepted,' it does not follow that payment "of hire calculated by time should be suspended during the "whole course of its continuance." The ground of the decision seems to have been that, as the owners had no voice in the question what ports the ship was to be sent to, they were in no way responsible for her being put out of use, and, therefore, hire was payable. There is a clear implication that, if the owners had been responsible, hire would have been suspended.

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(1) [1905] 2 K. B. 101.
(2) [1905] 2 K. B. 92.
(3) 1907 S. C. 507.

The last case to which I wish to refer appears to me to be conclusive on this question. In *Modern Transport Co., Ld.* v. *Duneric Steamship Co.* (2) a time charter provided that the owners should let and the charterers should hire a steamship for twelve months at a certain rate payable monthly for hire. The charterparty contained certain restrictions on the user of the ship and certain exceptions, by one of which restraint of princes was mutually excepted. The charterers were to have the option of sub-letting the ship. After the ship had been placed at the charterers' disposal the Admiralty, by notices addressed first to the owners and then to the charterers, requisitioned her for the service of the government and sent the owners a form of charterparty free from the restrictions of the time charter and specifying a monthly sum for hire less than that named in the time charter. The ship was then

(1) 1907 S. C. 516.

(2) [1917] 1 K. B. 370.

placed at the disposal of the Admiralty and was restored to the owners during the currency of the time charter. It was held that the owners were entitled to hire under the time charter notwithstanding the requisition of the ship by the Admiralty. In that case the argument of Mr. Roche, on behalf of the charterers, was (1): "There was a restraint of princes which "operated so as to prevent the defendants from giving to the "plaintiffs the use of the ship upon which the right to the "payment of the hire under the charterparty arose. The "'use and hire' of the ship was the consideration for which the "plaintiffs had to pay the defendants. The use of the ship "and the payment of the hire are dependent upon one another. "During the time when the ship was under requisition the "defendants did not give the plaintiff the use of the ship, "and the hire therefore was not payable for that time." It was not suggested that there was frustration. Mr. MacKinnon, on behalf of the shipowners, might have said: "Hire is payable, come what may, because there is no clause "in the charterparty providing for its suspension." But no such argument was put forward. Swinfen Eady L.J., in giving judgment, said (2): "Upon the plaintiffs' appeal the only "question is whether they continued liable to pay the monthly "hire while the vessel was under Admiralty requisition. The "plaintiffs contended that there was an entire failure of con"sideration, and that they could not be liable as they did not "have the use for which alone they were to pay the hire. The "first answer is that the defendants did not agree to give the use "of the ship absolutely and unconditionally, but only unless "prevented (amongst other things) by the restraint of princes. "Again, there was not an entire failure of consideration if the "charterparty was subsisting, as the plaintiffs would become "entitled to the hire payable by the Admiralty." That reasoning runs through all the judgments. It seems to me that the obvious inference is that if the defendants had agreed to give the use of the ship absolutely and unconditionally during the charter period and if there had been an entire failure of consideration during the period for which the ship was out of

(1) [1917] 1 K. B. 373.

(2) Ibid. 377.

use hire would have ceased during the requisition. In the present case the charterparty did absolutely and unconditionally, so far as degaussing was concerned, give the use of the ship to the charterers and there was an entire failure of consideration.

In none of these cases can I find laid down the principle for which Mr. Roskill contends, and I have sought in vain for any case supporting his contention cited. In Carver on Carriage by Sea, the only case is *Inman Steamship Co., Ld.* v. *Bischoff* (1). There the ship had been chartered to the Admiralty on monthly hire for three months certain and thenceforward until the Admiralty should give notice of discharge. The charterparty provided that, if for any cause the ship should become incapable of performing efficiently the service contracted for, the commissioners could put her out of pay or make such an abatement out of the hire as they thought fit. The owner effected an insurance against loss of freight by perils of the sea, and the action was brought against the underwriters on that policy. It was said that during the charter term the ship became inefficient through perils of the sea, and the Admiralty refused to pay the freight claimed. The question for decision was whether the loss was due to a peril of the sea or to the Admiralty's contractual right to make an abatement from freight to such extent as they thought fit. If the loss was due to that clause in the contract, it was not one for which the underwriters were responsible. The ship sailed for the Cape with troops on February 18, 1879, and on March 31 she struck a rock and became damaged and inefficient. The troops were taken off, but the stores were left in her until April 18. A certificate of fitness was given on April 17. The Admiralty would only pay freight up to the time of the accident although they had the use of the ship until April 18. In his opinion Lord Blackburn said (2): "It seems to me clear that neither Captain Adean at the "Cape, nor the commissioners at home, nor anyone else, "had power to discharge the *City of Paris* before the three "months certain for which she was hired. Had she totally

(1) 7 App. Cas. 670.

(2) Ibid. 683.

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"perished, so that she never could have been employed at "all again, the hire would have ceased from the time of her "destruction, but here use was made of her as a store ship "till April 17, and after she was repaired she was capable "of performing the work of a transport efficiently." Lord Blackburn then referred to *Havelock* v. *Geddes* (1), and read part of the passage (2) which I have already read, and he went on to express the view that what the Admiralty had really done was to exercise its power to deduct from the freight by way of mulct what it thought fit, and, therefore, there was not a loss of freight due to perils of the sea. How that can be relied on as an authority for the proposition in Carver on Carriage by Sea I fail to understand.

I hold that the view taken by the umpire was right. In my opinion, under this charterparty the freight was not payable during the period occupied by degaussing the ship, inasmuch as the charterers had no use of her during that time, and the withdrawal of the ship from their use was due to the voluntary act of the owners for their own purposes. If I am wrong, if the only remedy open to the charterers is a claim for damages, such damages could, of course, be set off against the freight. I am told that the ship had been hired out to sub-charterers at a profit, and that they have refused to pay in respect of this period, but the question of damages has not been explored by the arbitrator and I cannot deal with it.

Mr. Hodgson also contended that the delay during the degaussing period technically came within the expression "loss "of time from deficiency of . . . . stores," and, therefore, would be covered by cl. 12 in the charterparty. I cannot bring myself to agree with him. I do not think that on any reasonable construction of that expression it can be held to include degaussing apparatus. In my view the umpire was right, and therefore I answer the question asked me in favour of the charterers.

Solicitors for claimant: *Sinclair, Roche & Temperley, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for respondents: *William A. Crump & Son.*

(1) 10 East 555, 564.

(2) Ibid. 566.

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Nov. 11, 12; *Dec.* 16.

Revenue—Income tax—Avoidance of liability to taxation—Transfer of assets to company abroad—Income enjoyed by residents in United Kingdom—Income . . . . "payable" to company by virtue of transfer—Inclusion of partnership profits—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18, *sub-ss.* 1, 5*—Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 28, *sub-s.* 2.

By an agreement executed in 1933 four Englishwomen, resident in England, sold to a company, which was resident and incorporated in Rhodesia, a two-thirds share in a partnership in a mining enterprise. The remaining one-third share was vested in M., a resident of Rhodesia, where the mine was situated, and M. carried on the enterprise in partnership with the company. By the agreement the two-thirds share of the women was transferred to the company in consideration of 10,000 shares of 1*l.* each and 250,000 non-interest-bearing debentures of 1*l.* each. No interest was ever paid on the shares or debentures, but a substantial number of the debentures was redeemed each year :—

Held, that the share in the partnership profits received by the company was income which became payable to the company by means of a transfer of assets within s. 18 of the Finance Act, 1936, in conjunction with associated operations in the form of the activities of the partnership which resulted in the making of the profits, and, therefore, there being evidence on which the Special Commissioners of Income Tax were justified in finding that the agreement of 1933 was effected for the purpose of avoiding taxation and was not a bona fide commercial transaction within s. 28, sub-s. 2, of the Finance Act, 1938, and it being admitted that, if that were so, the operative part of s. 18 of the Act of 1936 applied, that the sums received by the debenture holders in respect of the redemption of debentures were to be deemed to be income of the debenture holders for all the purposes of the Income Tax Acts.

Decision of Lawrence J. [1941] 2 K. B. 162 affirmed.

APPEAL from decision of Lawrence J. (1).

The appellant, Herbert George Latilla, appealed to the Special Commissioners of Income Tax against assessments to sur-tax in respect of the years ended April 5, 1936 and 1937, and an additional assessment in respect of the year ended April 5, 1938. He also appealed against assessments to income tax for the years ended April 5, 1937 and 1938.

By an agreement, dated March 20, 1933, the appellant's wife, her two daughters, and a Mrs. Johnson, being all at that time resident in the United Kingdom, sold to a company, called Latjohn Trust, Ld., their shares in a mining partnership having the firm name of John Mack & Co. The shares in question were two one-third shares, of which one was owned by Mrs. Johnson and the other by Mrs. Latilla and her daughters in equal thirds. The remaining one-third share belonged to one John Mack who lived in Rhodesia where the mine owned by the partnership was situated. Latjohn Trust, Ld., was a limited company, resident in and incorporated under the laws of Southern Rhodesia, the incorporation taking place on the same day as the sale agreement. The consideration to which the four women were entitled under the agreement consisted of shares and non-interest-bearing debentures in the company, in each case of the nominal value of 1*l.*, Mrs. Latilla receiving 1667 shares and 41,667 debentures. The sale was to take effect as from April 1, 1932. Latjohn Trust, Ld., proceeded to carry on business in partnership with Mr. Mack who had consented to the sale. The accounts of the company showed the sums receivable by it in the various years in respect of its two-thirds share of the profits of John Mack & Co. The company never declared a dividend, but had applied its profits in redeeming debentures, and it had been the practice of Mrs. Latilla, her daughters and Mrs. Johnson to borrow money from the company in anticipation of the redemption of debentures, which they held.

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(1) [1941] 2 K. B. 162.

The Special Commissioners held that the transfer of assets effected by the agreement of March 20, 1933, was a transfer of assets within the terms of s. 18 of the Finance Act, 1936 (1),

(1) Finance Act, 1936, s. 18: "For the purpose of preventing "the avoiding by individuals "ordinarily resident in the United "Kingdom of liability to income "tax by means of transfers of "assets by virtue or in conse"quence whereof, either alone or "in conjunction with associated "operations, income becomes pay"able to persons resident or "domiciled out of the United "Kingdom, it is hereby enacted "as follows:—(1.) Where an in"dividual has by means of any "such transfer, either alone or in "conjunction with associated "operations, acquired any rights "by virtue of which he has, "within the meaning of this "section, power to enjoy, whether "forthwith or in the future, any "income of a person resident or "domiciled out of the United "Kingdom which, if it were "income of that individual

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and that, by reason of that transfer, income became payable to the company. They further found that the transfer of partnership interests for shares and non-interest-bearing debentures was effected mainly for the purpose of avoiding British taxation and was not a bona fide commercial transaction. They, therefore, confirmed the assessments. The appellant appealed against those findings, and Lawrence J. dismissed the appeal (1). The appellant appealed to the Court of Appeal.

J. Millard Tucker K.C. and *Terence Donovan* for the appellants. There has not been a transfer of assets " by virtue or in con-"sequence whereof . . . . income becomes payable to persons "resident or domiciled out of the United Kingdom " within the meaning of s. 18 of Finance Act, 1936. When a share in a partnership business is transferred to a foreign resident, no income thereby becomes payable to him. He may use the asset transferred to earn profits, but the profits he earns are not income which becomes payable by virtue of the transfer. The words " income becomes payable " must be given their ordinary meaning and not treated as meaning the same

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" received by him in the United " Kingdom, would be chargeable " to income tax by deduction " or otherwise, that income shall, " whether it would or would " not have been chargeable to " income tax apart from the " provisions of this section, be " deemed to be income of that " individual for all the purposes " of the Income Tax Acts : Pro-" vided that this subsection shall " not apply if the individual shows " in writing or otherwise to the " satisfaction of the Special " Commissioners that the transfer " and any associated operations " were effected mainly for some " purpose other than the purpose " of avoiding liability to taxation."

Finance Act, 1938, s. 28, sub-s. 2 : " The proviso to sub-s. 1 " [of s. 18 of the Finance Act, " 1936] shall cease to have effect " and the following two sub-" sections shall be inserted immedi-" ately after the said subsection " 1 :—(1A) [Not material] (1B) " The last two foregoing sub-" sections shall not apply if the " individual shows in writing or " otherwise to the satisfaction of " the Special Commissioners either " —(*a*) that the purpose of avoid-" ing liability to taxation was not " the purpose or one of the pur-" poses for which the transfer or " associated operations or any of " them were effected ; or (*b*) " that the transfer and any asso-" ciated operations were bona fide " commercial transactions and " were not designed for the pur-" pose of avoiding liability to " taxation."

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thing as "income accrues" or "income arises." The courts have always drawn a sharp distinction between income paid to a person and income consisting of profits or gains earned by way of trade: see *Trustees of Psalms and Hymns* v. *Whitwell* (1), where it was held that trading profits were not yearly interest or other yearly payment, and *Rex* v. *Special Commissioners of Income Tax* (2) where *Trustees of Psalms and Hymns* v. *Whitwell* (1) was distinguished. The profits here were produced by the combined effort of Latjohn Trust, Ld. and Mr. Mack, and not by virtue of the transfer of assets. [LORD GREENE M.R. The partner's share of the profits is treated in the accounts as a debt to the partner.] That is merely from an accountancy point of view. As Lawrence J. has decided this case it would make no difference if the whole of the partnership had been transferred to a company abroad and the profits earned by that company would be income becoming payable within the section. Sect. 18 is meant to apply to the transfer of such assets as stocks and shares.

Sir Donald Somervell A.-G. and *R. P. Hills* (*J. H. Stamp* with them) for the respondents. Sect. 18 is directed to preventing an escape from income tax by transferring assets abroad and the words "income becomes payable" must be given a wide, popular meaning so as to cover any kind of income. "Payable" can no doubt be contrasted in certain contexts with "arising," but no such fine distinction is intended in this section.

Tucker K.C. in reply referred to *Earl Beatty* v. *Commissioners of Inland Revenue* (3).

Cur. adv. vult.

1941. Dec. 16. LORD GREENE M.R. read the following judgment of the court (LORD GREENE M.R. and CLAUSON and DU PARCQ L.JJ.): The questions raised by this appeal are short and the answers to them do not, in our judgment, admit of doubt. [His Lordship stated the facts as set

(1) (1890) 3 Tax Cas. 7.
(2) [1923] 1 K. B. 393.
(3) (1940) 23 Tax Cas. 574.

out above, and continued:] The finding of the Special Commissioners that the transfer of the shares in the partnership to the company was effected mainly for the purpose of avoiding British taxation, and was not a bona fide commercial transaction, goes farther than is required by the proviso to sub-s. 1 of s. 18, of the Act of 1936, in force at the relevant times, which threw the burden of proof on the taxpayer. Nevertheless, an attempt was made, not very vigorously, to attack it on some ground which we must confess remains obscure to us. There was ample evidence to support the finding which is quite unassailable and we, therefore, say no more about it.

The substantial argument presented on behalf of the appellant was concerned with the words "income becomes "payable" in the preamble to s. 18. It is not disputed that, if those words are apt to describe the share of partnership profits received by the company, the operative part of the section applies to the case and the assessments as agreed are valid assessments. It is, accordingly, unnecessary to refer to the complicated provisions of the operative part of the section. The preamble explains the purpose of the legislation, namely, to prevent "the avoiding by individuals ordinarily "resident in the United Kingdom of liability to income tax by "means of transfers of assets by virtue or in consequence "whereof, either alone or in conjunction with associated "operations, income becomes payable to persons resident or "domiciled out of the United Kingdom." It is notorious that before the passing of this legislation individuals who were minded to enjoy their income without bearing the appropriate burden of British taxation were able to do so by transferring assets productive of income to a non-resident person or company by whom the income was retained abroad so as not to incur taxation here. The money representing the income was then by means of one or other of several well-known expedients transferred to this country as capital. The device used in the present case of transferring money by repayment of debentures was a favourite one, and it was effective for its purpose. These ingenious schemes the legislature set out

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to defeat in s. 18 of the Finance Act, 1936, and the question which arises in the present appeal is whether or not the transaction now under consideration falls outside its scope.

As we have said, the answer depends on the true construction of three words in the preamble. It was argued by Mr. Tucker on behalf of the appellant that the operative provisions of sub-s. 1 of s. 18 are confined to cases where the transfer of assets which has taken place is of the description mentioned in the preamble, namely, a transfer of assets "by virtue or "in consequence whereof, either alone or in conjunction with "associated operations, income becomes payable to persons "resident or domiciled out of the United Kingdom." With this argument we agree, since the words "any such transfer" in sub-s. 1 clearly refer to a transfer of the description mentioned in the preamble. Mr. Tucker then argued that the transfer in the present case, although it was a transfer of assets within the comprehensive definition contained in sub-s. 5, was not a transfer of that description since no income became "payable" to the company. He pointed out quite correctly that the assets transferred in the present case were shares in a partnership together with the interests of the transferors in the mining property itself, and that the income derived by the company was derived through the activities of the partnership in exploiting the mine. He contended that the words were not apt to describe income derived by a person's own exertions since income so earned is his own and cannot be said to be "payable" to him. In the special case of a partnership he referred to the limitations which existed at common law on the right of partners to sue one another and he claimed that the share of partnership profits to which the company became entitled could not be described as income which became "payable" to the company.

We disagree with all these contentions in their application to the facts of the present case and we need not discuss their wider implications. The share of the profits of the partnership to which the company is entitled is that share which comes to it in accordance with the terms of the partnership. The company is entitled to call on its partner to do whatever may be necessary, for example, by signing a cheque on the banking account of the partnership to enable the company to obtain its share. In the partnership accounts the company's undrawn share of profits would appear as a debt owing to the company. If the profits were under the control of the other partner, the company could, by appropriate proceedings, compel him to pay over its share. If this is not income " payable " to the company we do not know what it is. With regard to the argument that it was not the transfer of assets which produced the income, but the activities of the partners, we agree with the argument submitted by the Attorney-General that those activities are " associated operations " within the definition of that phrase in sub-s. 2. By that sub-section, so far as is relevant, an associated operation means, in relation to any transfer, "an operation of any kind effected by any person in "relation to any of the assets transferred," words of the widest import which, in our judgment, clearly cover the operation of turning the assets to account.

Although the figures are agreed, we must refer to a suggestion made by the Attorney-General in the course of his argument to the effect that the Crown in such a case as the present was entitled to go behind the accounts as agreed between the partners and examine the accounts of the partnership itself to ascertain what in the view of the Crown the profits of the partnership were. In our opinion, this would not be legitimate. The " income payable " to a partner is his share of the partnership profits which the partners in accordance with the partnership agreement determine to divide. He cannot demand more. It is right to say that the Attorney-General finally accepted the position that in the present case the Crown was bound to accept the actual amounts received by the company as being the correct basis for the assessments.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors for the appellants : *Birkbeck, Julius, Edwards & Co.*
Solicitor for the respondents ; *Solicitor of Inland Revenue.*
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Emergency legislation—National service—Armed forces—Conscientious objectors—Termination of employment—" By reason of duties or " liabilities " under the National Service Act—National Service (Armed Forces) Act, 1939 (2 *& 3 Geo.* 6, *c.* 81), *s.* 14, *sub-s.* 4—*National Service (Armed Forces) (Prevention of Evasion) Regulations,* 1939 (*St. R. & O.* 1939, *No.* 1099), *reg.* 2 (1.) (*a*).
Justices—Appeal—Case stated—Form.

The employment of the appellants was terminated by their employers on the ground that they were conscientious objectors and had sought to avail themselves of the privileges accorded to such persons by s. 5 of the National Service (Armed Forces) Act, 1939 :—

Held, that the employment of the appellants had not been terminated by reason of any duties or liabilities which they were or might become liable to perform or discharge by reason of their having been called from their civil employment for service under the Act within the meaning of s. 14, sub-s. 4, of the Act or reg. 2 (1.) (*a*), of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939, made thereunder, and, therefore, the employers, in dismissing them, had not committed an offence under the regulations.

Regulation 2 (1.) (*a*) *held* not to be ultra vires s. 14, sub-s. 4, of the Act.

Observations on the form of a case stated by justices.

CASE stated by stipendiary magistrate for Huddersfield.

At a court of summary jurisdiction sitting at Huddersfield on October 10 and 28, 1940, informations were preferred by the appellants under the National Service (Armed Forces) Act, 1939, against the respondents for that, on August 1, 1940, the respondents, being employers, did terminate the appellants' employment by reason of duties or liabilities which the appellants were or might become liable to perform or discharge by virtue of the National Service (Armed Forces) Act, 1939, contrary to reg. 2, of the National Service (Armed

Forces) (Prevention of Evasion) Regulations, 1939, and s. 14, sub-s. 4, of the Act (1).

The appellant, Downsborough, was aged twenty-eight and had been employed by the respondents for fourteen years. On May 25, 1940, he was provisionally registered under the National Service (Armed Forces) Act, 1939, in the register of conscientious objectors. On July 5, 1940, his case was heard by the local tribunal at Leeds, and it was ordered that his name be removed from the register of conscientious objectors and that he be registered in the military service register as a person liable to be called up for service but to be employed only in non-combatant duties. Downsborough appealed against this decision, but the appeal had not been heard. On July 22, 1940, the respondents' board of directors passed a resolution that " the contracts of service with the society of conscientious "objectors be terminated." A week's notice was accordingly given to the appellant ending on August 1, 1940. At a meeting of the directors held on July 29, 1940, the resolution was rescinded, and it was resolved " that all employees appealing "against military service on conscientious grounds be given "one week's notice to terminate their contracts of service with "the society."

The facts in the other two cases differed only in the following respects: The appellant, Wadsworth, who was also in the respondents' employment, had been provisionally registered as a conscientious objector, but in his case the tribunal had

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(1) By National Service (Armed Forces) Act, 1939, s. 14, sub-s. 4: The Minister of Labour is empowered to make regulations " to " restrain employers from terminating the employment of " their employees by reason of any " duties or liabilities which they " are or may become liable to " perform or discharge by reason " of their having been called from " their civil employment for " service connected with the " present emergency, or to make " provision for the prevention of " evasion of the provisions of this " section . . . ."

By National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939 [which were made under s. 14, sub-s. 4], reg. 2 (1.): " An employer shall " not terminate the employment " of any person employed by him " (*a*) by reason of any duties or " liabilities which that person is or " may become liable to perform " or discharge by virtue of the " provisions of the Act . . . ."

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ordered his removal without qualification from the register, and from this decision he had appealed. If the appeal tribunal decided against him, he was willing to serve. On July 25, 1940, the respondents gave him a week's notice dismissing him on the ground that he was a conscientious objector. The appellant, Ardron, was at all times willing to join the Army for non-combatant duties, and had applied to join the Royal Army Medical Corps, but had been refused. He was also provisionally registered as a conscientious objector, and on his case coming before the local tribunal in June, 1940, it was ordered that his name be removed from that register and that he be registered in the military service register, but for non-combatant duties only. In July, 1940, the respondents gave him notice of dismissal on the ground that he was a conscientious objector.

The magistrate found that all three appellants had been dismissed on the ground that they were conscientious objectors, but he held (1.) that reg. 2 (1.) (*a*), of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939, under which the proceedings were brought was ultra vires; (2.) that s. 14, sub-s. 4, of the Act of 1939 protected only those who were called up and not those who were merely liable to be called up; (3.) that the word "service" in the Act meant service in the armed forces of the Crown (except where the context showed a different meaning, as in s. 11, sub-s. 1 (*b*); and (4.) that, even if reg. 2 (1.) (*a*) were not ultra vires, the appellants had not, by registering as conscientious objectors and attending before the local tribunal, performed "duties" imposed on them by the Act, and that, therefore, their employment had not been terminated by reason of any "duties or "liabilities which they were or might become liable to perform "or discharge" by virtue of the provisions of the Act. He, accordingly, dismissed the informations, but stated this case for the opinion of the High Court (1).

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(1) As a preface to their judgments each of their Lordships who composed the court commented on the form in which special cases should be stated, and desired that the matter should be brought before clerks of courts of summary jurisdiction. Humphreys J. said: The judges of the King's Bench Division have consistently—of my own knowledge for over fifty years—

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Valentine Holmes (*E. A. Greenwood* with him) for the appellants. The magistrate was wrong. Regulation 2 (1.) (*a*) is intra vires and only gives effect to s. 14, sub-s. 4, of the National Service (Armed Forces) Act, 1939. It forbids the termination of a person's employment "by reason of any "duties or liabilities which that person is or may become "liable to perform or discharge" by virtue of the provisions of the Act, and that includes the duty of applying under s. 5 for registration as a conscientious objector. Alternatively, the applications by the appellants contributed to the termination of their employment by the respondents, and, therefore, their employment must be deemed to have been terminated by reason of such applications: see reg. 3 of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939 (1). There was no evasion of duty by the appellants. They applied to be put on the register of conscientious objectors, which was the course laid down for them if they did not register for military service.

Sellers K.C. and *Harold Rhodes* for the respondents. The grounds for the dismissal of the appellants were not that they were performing or discharging any of the duties and liabilities referred to in s. 14, sub-s. 4, of the Act. Those duties and

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expressed the view that a case should be stated by justices in a particular form. No form is to be found prescribed in the Act, the only requirement is to be found in the old Crown Office Rules, which provides that a case when stated is to be divided into paragraphs, which, as near as may be, shall be confined to distinct portions of the subject, and every paragraph shall be numbered consecutively. The form which has been invariably approved by the court, and any distinct variation from which has been invariably condemned by the court, is that which is to be found in Douglas's Summary Jurisdiction Acts, 10th ed., p. 313. That is the form in which all special cases of this nature should be stated.

(1) By reg. 3 of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939: "In any proceedings for an "offence under these regulations, "if the court before whom "the proceedings are taken is of "opinion that there is reasonable "cause to believe that the duties "or liabilities aforesaid caused or "contributed to the termination "of the employment . . . , the "employment shall be deemed to "have been terminated by reason "of such duties or liabilities . . . ."

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liabilities are the ones which a man would undertake when he was called up for military service, and the appellants were dismissed because they were taking advantage of the provisions of s. 5 to evade service as combatants. There is a finding of fact that the dismissals were on the ground that the appellants were conscientious objectors. Sect. 5 imposes no duty on the person concerned, but merely gives him an option to take advantage of its provisions. The respondents were entitled to dismiss the appellants on any ground other than that specified in s. 14, sub-s. 4, and the magistrate was right in dismissing the informations.

Holmes replied.

VISCOUNT CALDECOTE C.J. The National Service (Armed Forces) Act, 1939, s. 14, makes it incumbent on the employer of a person who is called up for service under the Act to reinstate him in his employment at the determination of his military service in an occupation and under conditions not less favourable to him than those which he would have enjoyed if he had not been called up. There is no reference in the section to the position of conscientious objectors. The procedure to be followed by any person liable to be called up for service who conscientiously objects to military service is prescribed in s. 5 of the Act, which empowers any such person to apply to be registered as a conscientious objector in a special register to be kept by the Minister of Labour. When his name has been placed on the special register, it becomes his duty to apply to be dealt with by the local tribunal on the footing that he genuinely has a conscientious objection to military service. If he succeeds in persuading the tribunal of the sincerity of his convictions, he is accepted as a conscientious objector. If, on the other hand, he is unsuccessful, he may submit to military service, as one of these appellants has done in view of his appeal under s. 5, sub-s. 4, being unsuccessful. In that case it may be thought a little unfair to describe him as a conscientious objector. He would in these circumstances be a person who was undertaking military duties although he had availed himself of the powers contained in s. 5. On the other hand, it may be that if he is unsuccessful before the appeal tribunal, he will decline to perform the duties assigned to him, whether full military duties or only non-combatant duties. In that case, it would be right, no doubt, to describe him as a conscientious objector. I have made these observations to express my opinion that the phrase "conscientious objector" is not a term of art with any exact meaning, but one which depends on the circumstances of the case, for its precise significance.

Sect. 14, sub-s. 4, under which the regulation here in question is made, only affects conscientious objectors as members of the great class of people who become liable under the Act to perform military service. I have stated very briefly the general effect of s. 14, sub-s. 1, but it occurred to Parliament to make provision for cases in which it would be impossible to reinstate a man in his occupation "under conditions not less favourable," where the employer had deliberately taken steps to make it impossible. Therefore, s. 14, sub-s. 4, empowers the Minister, if he "is satisfied that "it is necessary to restrain employers from terminating the "employment of their employees by reason of any duties or "liabilities which they are or may become liable to perform "or discharge by reason of their having been called from their "civil employment for service connected with the present "emergency, or to make provision for the prevention of "evasion of the provisions of this section," to make regulations for those purposes. The Minister was so satisfied, and the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939, were made accordingly. Regulation 2 (1.) provides as follows: "An employer shall not terminate the "employment of any person employed by him (*a*) by reason "of any duties or liabilities which that person is or may become "liable to perform or discharge by virtue of the provisions of "the Act, or (*b*) in order to evade the obligations imposed by "sub-s. 1 of s. 14 of the Act." The regulation provides a fine for a breach of its provisions.

The first question is whether that regulation is ultra vires the Act or not. Mr. Sellers, on behalf of the respondents, has told us that that point was not one of the arguments originally relied on, but that it was raised by the magistrate and then adopted by the respondents. It was rather faintly argued before us, but I have formed a clear opinion on it. The regulation, which follows the language of the section, perhaps a little too slavishly, has not been found so clear and satisfactory in practice as was desired, and our attention has been called to an amended regulation which was made with the same object. I can, however, see no ground on which the regulation can properly be said to be ultra vires s. 14, sub-s. 4. The regulations, by reg. 5, only apply where the employment is terminated before the date on which the employee has been called up for service. Obviously it was thought that where the dismissal had taken place after the man had been called up, he was protected by s. 14, sub-s. 1. Sub-s. 4 contemplates the prohibition of dismissals before the calling up, if made "by reason of any "duties or liabilities which they" [the employees] "are or "may become liable to perform or discharge by reason of their "having been called from their civil employment for service "connected with the present emergency." Regulation 2 (1.) (*a*) seems to me in rather briefer form, but sufficiently in accordance with the powers conferred by s. 14, sub-s. 4, to carry out the Minister's intention to exercise his power under the Act. I cannot see that reg. 2 (1.) (*a*) in any way goes outside the provisions of sub-s. 4. It follows almost word for word the language of the sub-section. I do not think it has been suggested that reg. 2 (1.) (*b*) is ultra vires. The intention of sub-s. 4 seems to me to be the same as that of the reg. 2 (1.) (*a*), and I hold that the regulation is intra vires the Act.

The question then arises whether the respondents committed an offence against the regulation. [His Lordship stated the facts, and continued :] On these facts I find it impossible to say that the magistrate came to a wrong conclusion when he found that the appellants were dismissed because they were conscientious objectors, and it seems to me also impossible to say that a man who is discharged because he has availed himself of his rights under s. 5 of the Act is discharged because of the duties and liabilities which he might have become liable to perform or discharge if he had not availed himself of those rights. Mr. Holmes has argued for the appellants that the regulation, which he accepts as intra vires, forbids the termination of the employment of a person "by reason "of any duties or liabilities" which he "may become liable "to perform" by virtue of the provisions of the Act; that a person applying under s. 5 to be treated as a conscientious objector has certain duties which have to be performed, such as applying to the local tribunal and submitting himself for medical examination; and, therefore, that a man can be said to be dismissed by reason of the duties or liabilities mentioned when the reason for which he is being discharged is that he has availed himself of a privilege given by s. 5. I think that the words "duties or liabilities" in this part of the regulation refer, not to the duties or liabilities which a man who avails himself of s. 5 must perform or discharge, but to the "duties and liabilities" referred to in s. 14, sub-s. 4, namely, those which a man will have to undertake when he is called up for military service in some form. As the magistrate has, in my opinion, rightly come to the conclusion that the appellants were dismissed on the ground that they were conscientious objectors, I do not find that he has committed an error in point of law or has misunderstood or misapplied the provisions of the regulation. The broad fact is that the last thing in the world the respondents did was to dismiss the appellants because they were going to perform or discharge duties or liabilities of a military character. They dismissed them because they took advantage of the provisions of the Act to try to avoid the performance or discharge of those duties or liabilities. I do not wish to be understood as expressing any approval of the act of a person who tries to penalize another for holding opinions, religious or otherwise, but there is nothing in the Act, of which I am aware, to deprive an employer of the right to dismiss a servant on any ground he likes except the regulations made under s. 14, sub-s. 4. If an employer chooses,

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before a man is called up, to dismiss him for intemperance, or dishonesty, or incompatibility between the two of them, or for any other cause, he may do so. If he discharges him by reason of the duties or liabilities of a military character, which he is or may become liable to perform, then only is an offence committed.

There is one other point. Regulation 3, to which Mr. Holmes referred, provides that "in any proceedings for an offence under "these regulations, if the court before whom the proceedings "are taken is of opinion that there is reasonable cause to "believe that the duties or liabilities aforesaid caused or "contributed to the termination of the employment . . . . "the employment shall be deemed to have been terminated by "reason of such duties or liabilities." That provision is favourable, and is intended to be favourable, to persons who have been dismissed, but I am quite unable to say that the facts lead inevitably to the conclusion that the duties or liabilities mentioned in s. 14, sub-s. 4, caused or contributed to the termination of the employment of the appellants.

For these reasons, it is impossible to interfere with the magistrate's decision that no offence had been committed in any of those three cases.

HUMPHREYS J. The magistrate held that reg. 2 of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939, was ultra vires the statute which conferred the power to make it. In my opinion, his decision on that point was the result of entirely misreading the material subsection of the statute. He said: "It is quite clear, in my "opinion, that the protection provided by s. 14, sub-s. 4, of "the Act only extends to those who are actually called up," and, therefore, he held that it could not properly be accorded to the appellants. When, however, I look at s. 14, sub-s. 4, I cannot find anything to justify that view. It appears to me to be plainly applicable to persons who are liable to military service as well as to those who have actually been called up, and I can find no reason for holding that this regulation, which almost word for word follows the language of s. 14, sub-s. 4, should be held to be ultra vires.

The magistrate has also held in each of these cases, both as a fact and in law, that the appellant was dismissed from his employment by the respondents because he was a conscientious objector. [His Lordship examined the facts and expressed the view that the resolution of the respondents' board meant that the respondents declined further to employ persons of military age, and, therefore, liable to military service, who took advantage of s. 5 of the Act.] That being so, the question arises : Do the respondents come within the terms of reg. 2, which provides that an employer shall not terminate the employment of any person employed by him "by reason of any "duties or liabilities which that person is or may become "liable to perform or discharge by virtue of the provisions "of the Act." I cannot find that any duties or liabilities which the appellants were liable to perform or discharge by virtue of the provisions of the Act were the cause of their being dismissed. On the contrary, I entirely agree with my Lord that they were dismissed because they did not perform or discharge the duties or liabilities which attached to persons of their age, but did their best to get out of them. In saying that, I am not casting any reflection on the appellants. Indeed, one of them was anxious to serve his country, and only asked that he might be put in the medical service of the Army. He has, apparently, got much of what he desired.

For these reasons, I agree that this appeal should be dismissed.

LEWIS J. I agree. Two questions have been argued before us. The first is that reg. 2 (1.) (*a*) of the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939, was ultra vires. I have considerable difficulty in following the reasoning of the magistrate who came to the conclusion that it was. For that reason, I am reluctant to say anything more, lest I should appear to be doing him an injustice, but I have considered the Act and the regulation and I have listened to the argument which has been put before this

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court, and I entirely agree with the words which have fallen from the Lord Chief Justice and Humphreys J., and see no ground for holding that the regulation is ultra vires.

The second matter which was argued was whether there was evidence to support a conviction on these informations. Subject to the terms of reg. 3, to which the attention of the magistrate was not drawn, in such a case as the present the prosecution must prove that the dismissal of the employees was by reason of duties or liabilities which they were or might become liable to perform or discharge by virtue of the provisions of the Act. As I read the decision of the magistrate, it is tantamount to saying that he is not satisfied that the appellants had discharged the onus of proving that the termination of their employment was due to that cause. I can see nothing in the Act which interferes with an employer's right to give proper notice to terminate the employment of any employee for any reason other than that specified in s. 14, sub-s. 4, of the Act and the regulations made under it. Whatever may be the ethics of the matter, on which it is not for me to express any opinion, there is nothing to prevent an employer dismissing a man because he holds certain political, religious, or, it may be, for the time being unpopular opinions. That any man should be victimized for holding such opinions may be considered reprehensible from every point of view other than legal, but this court has not to go into matters of that sort. The only interference with the liberty of an employer to dismiss employees is that he must not dismiss them, in the terms of s. 14, sub-s. 4, "by reason of any duties or "liabilities which they are or may become liable to perform "or discharge by reason of their having been called from "their civil employment for service connected with the present "emergency." I am satisfied that the employment of the appellants was terminated because, as the magistrate has stated, they were conscientious objectors within the ordinary meaning of that expression. The phrase was in general use to describe persons who held certain views long before the passing of the Act, but, even if the term, when used in the first resolution passed by the respondent's directors, means

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one who is qualified to be so called by reason of his having taken advantage of the privileges afforded by s. 5 of the Act, it seems to me to make little or no difference. It may well be that the second resolution which was passed by the directors was explanatory of what they meant by their original resolution. However that may be, it is impossible to say that the magistrate was wrong in coming to the conclusion that the respondents terminated the employment of the appellants for some reason other than that of any duties or liabilities which they were or were likely to be liable to perform or discharge under the Act. In my opinion, the converse is true, and the appellants were dismissed because they had sought to evade the duties and liabilities which were imposed on them under the Act. I, therefore, agree this appeal does not succeed.

Appeal dismissed.

Solicitors for the appellants: *Masser & Co., Leeds.*

Solicitors for the respondents: *Haslewood, Hare & Co., for Aston, Harwood & San Garde, Manchester.*

F. P. F.

CROFT (H.M. INSPECTOR OF TAXES) *v.* SYWELL AERODROME, LIMITED.

SYWELL AERODROME, LIMITED *v.* CROFT (H.M. INSPECTOR OF TAXES).

C. A.

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Nov. 13, 14, 17, 18; *Dec.* 17.

Revenue—Income tax—Occupation of land—Aerodrome—Lease of hangars and other buildings to aviation company—Licence to aviation company to use a service hangar and have sole right to sell petrol and execute repairs to aircraft—Other licences to use aerodrome—Maintenance of ground by aerodrome company—Profits of aerodrome company—Method of assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. A, No. I; sch. B; sch. D, cases I, VI.*

A company, which owned an aerodrome equipped with hangars, lecture rooms, a kitchen, and other buildings, let to an aviation company at a rent a number of the buildings with the right to use the aerodrome for the flying purposes of a Royal Air Force school of flying in common with other users of the aerodrome for

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the term of four years from June 10, 1936; and they also granted the aviation company a licence in consideration of a yearly payment giving it the sole right to use a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. The aerodrome company also granted licences to flying clubs to use the aerodrome, and they further received income from garage rents, housing and landing fees of aeroplanes, and a percentage of the earnings, of another company from the sale of ice cream. The company were responsible for keeping the aerodrome in good order and for this purpose employed a groundsman:—

Held, by Lord Greene M.R., and Clauson L.J. (du Parcq L.J. dissenting) that all the activities of the company at the aerodrome arose from the exercise and exploitation of their rights of property, and were, therefore, covered by an assessment to income tax under sch. A, and that the company was not assessable under sch. D, cases I. or VI.

Fry v. *Salisbury House Estate, Ld.* [1930] A. C. 432, and *Lord Glanely v. Wightman* [1933] A. C. 618, applied.

Coman v. *Governors of Rotunda Hospital, Dublin* [1921] 1 A. C. 1, and *Carlisle and Silloth Golf Club* v. *Smith* [1913] 3 K. B. 75, distinguished.

Shop Investments, Ld. v. *Sweet* (1940) 23 Tax Cas. 38, approved.

Appeals from Lawrence J.

The Sywell Aerodrome, Ld., were incorporated as a limited company on January 14, 1933, to acquire, provide and maintain aerodromes and carry on business thereon. The company owned freehold land at Sywell, Northamptonshire, which had been laid out as an aerodrome known as Sywell aerodrome. The aerodrome was equipped with hangars, lecture rooms, a kitchen, Royal Air Force Reserve mess room, lounge, club rooms and eight bungalows. The company held a licence dated November 26, 1935, by which the Air Ministry licensed the aerodrome for use as a regular place of landing or departure by aircraft carrying passengers for hire. On April 9, 1936, the company let to Brooklands Aviation, Ld., for a period of four years from June 10, 1936, certain hangars and lecture rooms and the kitchen, R.A.F. Reserve mess-room and eight bungalows with the right to use the aerodrome for the flying purposes of an R.A.F. school of flying in common with all other users of the aerodrome. The maximum rent reserved by the lease was 1850*l.*, but, owing to a new officers' mess and a building for the ambulance and fire-tender being added, the rent paid for the year 1937–8 was 2450*l.* 14*s.* 10*d.* inclusive of rates or 2302*l.* net. Under the lease Brooklands Aviation, Ld., were granted the sole right to establish at Sywell aerodrome an R.A.F. Reserve school of flying. The company also granted to Brooklands Aviation, Ld., in consideration of the payment of a yearly sum the sole right to use and occupy a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. In addition, the company received the rent of two clubhouses used by members of the Northamptonshire Aero Club and East Midlands Flying Club, Ld., with the right for the respective members to use the aerodrome. The company also received income from garage rents, housing and landing fees in respect of other aircraft using the aerodrome, and a percentage of the money obtained by certain vendors of ice cream. The company were responsible for keeping the aerodrome landing grounds in order and for this purpose employed a groundsman.

The Company were assessed to income tax under sch. A to the Income Tax Act, 1918, for the whole of their property including that leased to Brooklands Aviation, Ld., and the two clubs. The company were also assessed under sch. B. The total of the original assessments under schs. A and B for the year 1937–1938 amounted to 574*l.*, but additional assessments brought the total to 754*l.* 3*s.* The additional commissioners of income tax for the division of Northampton also made an estimated assessment upon the company under sch. D for the year 1937–1938 in the sum of 1200*l.* in respect of aerodrome profits and from this assessment the company appealed to the general commissioners for Northampton. It was stated by the secretary of the company that the rent reserved by the lease to Brooklands Aviation, Ld., was not a rack rent within the meaning of No. I. of sch. A by reason of the fact that in fixing the rent regard was had to the fees which would be normally charged to the aircraft of Brooklands Aviation, Ld., for landing. The amount of the sch. A assessment was the amount stated by him to be the rack rent and the balance of the rent of 2450*l.* 14*s.* 10*d.* was a payment for the use of the aerodrome in lieu of landing fees. The commissioners were of opinion that there was a liability to tax under sch. D,

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case VI., and, the amount on which the tax on this view was charged having been agreed between the company with the inspector the commissioners confirmed the assessment in the sum of 1029*l.*, less 75*l.* wear and tear.

On a case stated by way of appeal by the company and cross-appeal by the inspector of taxes for the opinion of the court, Lawrence J. held that the company's occupation of the aerodrome was occupation within the meaning of sch. B and that they did not in addition carry on a concern in the nature of a trade which was a separate and distinct operation unconnected with the occupation of the land, so as to render them assessable under sch. D, and he, therefore, allowed the company's appeal and dismissed the cross-appeal. The Crown appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The company are assessable to tax in respect of the profits or gains of their business under sch. D, case I., of the Income Tax Act, 1918, as well as being liable to assessment under sch. B in respect of the occupation of the land comprising the aerodrome. Should the Crown's contention be upheld, an allowance would be made in the assessment under sch. D for the assessment under sch. B to avoid double taxation. The assessment under sch. D should be in respect (1.) of the profits or gains of the company's activities from the public, and (2.) of part of the amount paid by Brooklands Aviation, Ld., being the part paid for the provision of the facilities of an equipped aerodrome after excluding what was paid as rent for the premises let to that company. [Clauson L.J. Can the fact that Brooklands Aviation, Ld., carry on the business of providing aerodrome facilities on the company's ground put the company in the position of carrying on that trade?] Yes. Here the company alone are licensed to use the land as an aerodrome and have equipped it for that purpose. That is the trade which is being carried on and the company are in part carrying it on by licensing the use of the aerodrome by Brooklands Aviation, Ld. That a trade carried on in the open is assessable under sch. D is established by *Carlisle and Silloth Golf Club* v.

Smith (1), a case expressly approved in *Coman* v. *Governors of Rotunda Hospital, Dublin* (2). Other authorities to the same effect are *Carnoustie Golf Course Committee* v. *Inland Revenue Commissioners* (3), *Inland Revenue Commissioners* v. *Stonehaven Recreation Ground Trustees* (4), and *Smith* v. *York Race Committee* (5). A case relied on in support of the contrary view is *Lord Glanely* v. *Wightman* (6) which related to the profits earned by a stallion on a stud farm. It was held that the activities in regard to the stallion were not severable from the occupation of the farm. There, however, it was admitted that the occupation of the land as a stud farm was husbandry within sch B. and that the stallion's activities could not be isolated. *Fry* v. *Salisbury House Estate, Ld.* (7), is also distinguishable. The landlords admitted that they were carrying on a trade in providing services such as heating and cleaning for the offices in the building they owned. The Crown wished to include in the receipts of trade the rents of the offices, but those receipts were covered by sch. A and it was immaterial that the landlords were also carrying on a trade in respect of collateral activities connected with the offices. Assessment under sch. B covers matters arising from the normal occupation of land and no more. It might be said against the Crown's contention that sch. B does not exclude land not used for husbandry unless it comes within the proviso to r. 1, as being a dwelling-house not occupied with a farm or a warehouse or other building occupied for the purpose of carrying on a trade or profession, but a person who uses land for a golf club or a racecourse or an aerodrome is conducting a venture which has nothing to do with the normal user of land. He is using it for a purpose unconnected with its occupation within the meaning of sch. B, and is carrying on a business in the nature of a trade: *Russell* v. *Town and County Bank, Ld.* (8). Like a golf club an aerodrome is taxable under case I. of sch. D rather than case VI. [They

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(1) [1913] 3 K. B. 75.
(2) [1921] 1 A. C. 1.
(3) 1929 S. C. 419.
(4) 1930 S. C. 206.
(5) [1934] 1 K. B. 517.
(6) [1933] A. C. 618.
(7) [1930] A. C. 432.
(8) (1888) 13 App. Cas. 418.

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also referred to *Inland Revenue Commissioners* v. *Melross* (1), *Jones* v. *Nuttall* (2) and *Forth Conservancy Board* v. *Inland Revenue Commissioners* (3).]

Cyril King K.C. and *Scrimgeour* for the company. All the profits made by the company are covered by the assessments under sch. A or sch. B. The assessment under sch. A covers profits from the exploitation of land as such as, for example, the demise of land at a rent or the grant of an easement for valuable consideration. Licences in this respect do not differ from leases so that the lease to Brooklands Aviation, Ld., and the licences to use the aerodrome arise from the property quality of the land. Whatever business was carried on at the aerodrome was being conducted by the tenants of the company and not by the company. The annual value for purposes of sch. A is fixed as of lands as they are equipped and in this case, therefore, it covers the equipment of the aerodrome. It is only in respect of services unconnected with the land as such that profits are assessable under sch. D: *Fry* v. *Salisbury House Estate, Ld.* (4); and the services of the groundsman provided by the company in the present case clearly related to the land. Everything the company have done was done in the exercise of their proprietary rights and is covered by the assessments under sch. A and sch. B. [They referred to *Glenwood Lumber Co., Ld.* v. *Phillips* (5).] In *Coman* v. *Governors of Rotunda Hospital, Dublin* (6), it was not argued that the yield from licences to use rooms for entertainments should be segregated from the services rendered so that only the profits from the services would be assessable under sch. D. The hospital claimed exemption in respect of the whole profits on the ground that they were used for charitable purposes. That case has no bearing here. The distinction between activities covered by sch. A and those properly assessable under sch. D was first recognized in *Fry* v. *Salisbury House Estate, Ld.* (4). This is the explanation of the decision in *Lord Glanely* v. *Wightman* (7); see also *Elliott* v. *Burn* (8) and

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(1) (1935) 19 Tax Cas. 607.
(2) (1926) 10 Tax Cas. 346.
(3) [1931] A. C. 540.
(4) [1930] A. C. 432.
(5) [1904] A. C. 405, 407.
(6) [1921] 1 A. C. 1.
(7) [1933] A. C. 618.
(8) [1935] A. C. 84.

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Whelan v. *Alfred Leney & Co., Ld.* (1). The company's submissions as to sch. B are similar to those relating to sch. A. The charge under sch. B is in respect of the occupation of lands. No doubt, the schedule originally contemplated the occupation of lands for agricultural purposes only; but its language is wide enough to cover occupation for all purposes not expressly excluded by r. 1. Sect. 34 of the Income Tax Act does not affect the ambit of sch. B. All the company's own activities on the aerodrome are covered by sch. B and in none of the cases relied on by the Crown in support of their claim was the point now being made taken. [They also referred to *Shop Investments, Ld.* v. *Sweet* (2).]

Sir Donald Somervell A.-G. replied.

Cur. adv. vult.

1941. Dec. 17. The following judgments were read. LORD GREENE M.R. The relevant facts appear from the stated case and the accompanying documents, but it is necessary for the purposes of this judgment to set out certain salient matters which have particular importance in the consideration of the questions which arise. The income of the company is derived from two classes of transactions. The one class consists of actual demises of buildings, the other of licences. The licensees are (1.) Brooklands Aviation, Ld., whose licences cover the non-exclusive use of the landing ground and the exclusive right to repair aircraft and supply petrol, (2.) two flying clubs who have non-exclusive licences to use the landing-ground, (3.) owners of visiting aircraft who pay a landing fee, (4.) a company which sells ice-cream. Whatever trades or businesses any of these licensees may carry on I should have thought it clear that those trades or businesses are not in any sense carried on by the company who are not repairers of aircraft or sellers of petrol or ice-cream.

The Attorney-General, in his argument for the Crown, contended that, although, as regards the profits earned by the licensees in their businesses, the company were not assessable, yet the company were in a sense carrying on those businesses

(1) [1936] A. C. 393.
(2) (1940) 23 Tax Cas. 38.

vicariously. The execution of repairs and the supplying of petrol were, he said, part of the business of an aerodrome proprietor who normally performs such services, and the company could not escape from the allegation that they were carrying on such a business by showing that the services in question were rendered to those desiring them, not by the company themselves, but by licensees. I am afraid that I cannot follow this argument. If the argument had been that the company were carrying on the business of granting leases and licences of an aerodrome which they had constructed I could have understood it, but it would not have assisted me to solve the question which is before us, namely, whether or not profits derived from such transactions are exclusively taxed under schs. A and B. To assert that the company are carrying on a business, and, therefore, are liable to tax under sch. D is to beg the question. But I shall have to consider in the course of this judgment certain services performed by the company. They are (1.) the services of their groundsman whose function is to keep the surface of the landing-ground in good order, (2.) the provision of first-aid appliances and tools under a condition contained in the licence from the Air Ministry. This condition can, apparently, be satisfied by keeping the appliances and tools in an accessible place without the necessity of having any staff to use them or hand them out. On the facts the general commissioners held that the company were liable to be assessed under sch. D, case VI., of the Income Tax Act, 1918.

The first contention on behalf of the Crown was and is that the company were in respect of the sum of their activities carrying on a trade and were consequently assessable under case I. of sch. D. This contention the commissioners quite clearly negatived by implication. This appears from the language of case VI. which only applies to profits not falling under any of the foregoing cases. Having regard to the conclusions which I have reached, it is unnecessary to consider the question whether, in view of the finding of the commissioners, it is open to the Crown to argue that the relevant case is case I. The company's contention was to the effect

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that all their profits are derived from their property rights as owners of the aerodrome or from the occupation of the land, or, alternatively, from a combination of the two, and that, accordingly, they are completely covered by the assessments under sch. A or sch. B or both, as the case may be. The contention that the profits are derived from occupation found favour with Lawrence J. and these appeals result.

The questions raised by the appeals call for some re-examination of certain features of the Income Tax Acts which relate to assessments under sch. A and sch. B. If I may begin with a commonplace, income tax is a tax on income and this observation applies as well in the cases of schs. A and B as in those of the other schedules. There is, however, this difference, namely—that whereas the other schedules only deal with income actually received (calculated, it is true, in accordance with the relevant rules) in the case of schs. A and B the actual reception of income is not necessary in order to attract the tax. The owner of lands is deemed to obtain income from his mere ownership, and the occupier of lands is deemed to obtain income from his mere occupation. The measure of the income so deemed to be derived is in the ordinary case determined by reference to the annual value as defined. " The result " (to quote the language of Lord Dunedin in *Fry* v. *Salisbury House Estate, Ld.* (1)) " is that by the operation of the assessment "under sch. A, which is made imperative by the statute . . . . "the income of the assessee is so far dealt with and cannot be "dealt with again." The same is true of income which is assessed under sch. B. Where, therefore, in respect of any particular land, tax has been assessed (as it must be) both in respect of the property in the land under sch. A and in respect of the occupation of the land under sch. B, no further tax is exigible in respect of any income referable to that property or that occupation even if such actual income greatly exceeds the value on which the tax is calculated. Similarly, apart from specific provisions, the taxpayer who derives from his property or his occupation an actual income which falls below the assessed value can obtain no deduction of tax. It is perhaps

(1) [1930] A. C. 432, 439.

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not unnatural that the revenue authorities, finding in certain cases a very large excess of actual income over the assessed value have endeavoured to levy tax on that excess by treating it as referable to a trade under case I. of sch. D or to a profit under case VI. Instances of these endeavours are to be found in the case of sch. A in *Fry* v. *Salisbury House Estate, Ld.* (1), and in the case of sch. B in *Lord Glanely* v. *Wightman* (2). The effect of these decisions is that where profits are referable to property or occupation the Crown, like the subject, is bound by the statutory measure in accordance with which such profits fall to be ascertained. A further principle I think also emerges, namely, that, even if the profits in question are made by means of a highly organized commercial operation and one which in ordinary parlance would be described as a trading operation, the relevant schedule, be it A or B, must be applied. When once a profit is referable to property or occupation, in that category it must remain. It cannot be taken out of that category by calling the operation which gives rise to it a trading operation.

But these considerations do not solve the question ; What profit-making operations are referable to the right of property under sch. A or to occupation under sch. B ? In ordinary legal phraseology, the right to occupy is one of the rights of property and may, of course, become separated from the others. But for the purpose of the Income Tax Acts the right of occupation is treated as always so separated although it may be enjoyed by the person who owns the other rights of property. Thus, a person who is both owner and occupier is regarded as taxable in two different capacities in respect of two different profits calculated on two different principles. It is or may be —and in the present case I think it is—important to bear this in mind. To say, for instance, that each of the heads of profit which it is sought in the present case to tax falls under one or other of the two schedules is an unsatisfactory answer. If the respondents are right it is because these heads of profit are shown to fall under one or the other of the two schedules. They cannot fall under both.

(1) [1930] A. C. 432.

(2) [1933] A. C. 618.

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On principle and apart from authority and leaving aside special cases for which particular provision is made, the broad distinction between the two schedules appears to me to be that the profits falling under sch. A are those annual profits which an owner makes or could make by granting or limiting part of his rights as owner of the land in favour of others, while those falling under sch. B are those annual profits which an occupier makes or could make by his own operations on the land itself or by the unaided bounty of nature. The essence of the distinction which I see lies in the difference between rights which are a legal conception with no physical existence or reality and the land itself as a physical thing. Let me take the simple case of land belonging to A which is let at a rack rent to B. Here A is not himself by his own operations extracting profit from the land itself. He is transferring to B for an annual consideration part of his rights of property in relation to the land. B, on the other hand, is the occupier and as such is in a position to extract profit from the land itself by his own operations. In other words, A is exploiting his rights and B is exploiting the land itself which is the subject-matter of those rights. If, on the other hand, A, instead of leasing the land, retains it in his own hands, he is treated for tax purposes as deriving two different profits, the one which he could have made by exploiting his rights of property, the other which he makes or could have made by exploiting the land itself. The word "exploit" as I have used it requires a word of explanation. To adopt Romer L.J.'s illustration in the *Glanely* case (1), a man who occupies his land merely by sitting in it and therein writing poetry is not exploiting either his right of property in the land or the land itself. It is not correct to say that one of the rights of property is to sit on the land and write poetry. It is a right of property to occupy land, but the purpose for which it is occupied is from the point of view of property rights (and apart from such matters as restrictive covenants) irrelevant. The reason why a person can lawfully sit and write poetry on his land is not that his right of property confers any rights to write poetry but because

(1) (1932) 147 L. T. 466, 473; 17 Tax Cas. 634, 664.

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he is entitled to occupy that particular land by sitting on it or standing on it or lying on it as he pleases. The writing of poetry, on the other hand, is a thing which anyone is entitled to do wherever he may be, just as is the right to twiddle one's thumbs. The word "right" in regard to these activities is used in a totally different sense from that of rights of property. Similarly, an occupier in virtue of his right of occupation is entitled to sit on the land, but the writing of poetry is not an exercise of the right of occupation. The right to occupy the piece of land is essential to the writing of poetry on that piece of land and that is all that can be said about it.

The extraction of profit from the land may, of course, take different forms. Thus, the occupier may himself consume the fruits of the land or he may sell them to others. Such sales again may take different forms. The sale of potatoes grown on the land, the agistment of cattle, the provision of the services of a stallion and the accommodation of visiting mares are all in the last analysis utilization for profit of products of the land and they are inherently different from transactions under which the proprietor of a general or limited property in land grants to another rights over or in relation to the land. The typical example of such a transaction is that of a lease, but, for the purposes of sch. A, profits derived from property are not confined to profits derived under leases as appears from the decision of the House of Lords in *Elliott* v. *Burn* (1), to which I will refer later.

These considerations appear to me to provide an answer to the question : Why and on what principle is a person who, for example, sets up a refreshment stall on his land or provides services for people admitted to his land, not exhaustively taxed under sch. A or B (as the case may be) in respect of the profits so earned ? Such a person, in my view, is not exploiting his rights of property or of occupation save in the sense and to the limited extent that he must own or occupy the land before he can erect and carry on the refreshment stall or perform the services. The profits earned in such a case are referable, not to the exercise of the rights of property or of occupation since the customers come on to the land for the purpose of obtaining refreshment or procuring the benefit of the services. If, on the other hand, the owner of land having (let me suppose) a remarkable view or some historic monument merely allows the public to come on to the land in return for an admission fee, I cannot myself see why it should be said that his profits are not covered by the sch. A assessment since all that he is doing is to exploit his right of property by granting licences to come on the land. The fact that he keeps the paths in order or the monument in repair to make a visit more attractive to the public again appears to me to make no difference, any more than does the action of the landlord of a house in keeping it in repair.

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(1) [1935] A. C. 84.

To revert now to my illustration of A and B, it is to be noted that B's position is a dual one. As lessee he has vested in him part of the property rights of A. As lessee in occupation, he is in a position to exploit the land itself to his own advantage. Now, suppose that B in his turn subdemises the land to C. What he is then doing is not to exploit the land itself, but to exploit the rights in the land which the head-lease has conferred on him. In other words, the profit which he derives from the sub-lease is a sch. A matter, not a sch. B matter. But this does not mean that he is liable to bear tax in respect of the rent which he receives. He may or may not have to bear some tax according to circumstances. For example, if both the head-lease and the sub-lease are at the same rent, being a rack rent, C deducts the tax on paying his rent to B and B deducts the same amount of tax on paying his rent to A (sch. A, No. VIII., r. 4). If, on the other hand, the head-lease is at a rent which is less than a rack rent and the sub-lease is at a rack rent, B can only deduct from the rent which he pays to A a proportionate part of what C has deducted from the rent which he pays to B. The result of this is that the tax payable under sch. A is to be regarded as payable in respect of the totality of the property rights in the land notwithstanding that those rights may be separated so as to lie in different hands and any exploitation of those rights by any of the persons among whom they are distributed is covered by the one assessment. The incidence of the tax as between those persons may result in one of them paying the whole or in the tax being distributed among them as in the last example given. In support of this view I would call attention to the language used in sch. A, No. VIII., r. 4 (1.), in the second proviso to which reference is made to "such person as aforesaid," that is "a "landlord owner or proprietor . . . . who is also a tenant or "the occupier" and the contrasted phrase "a tenant occupier" in r. 1.

The relevance of these observations to the present case will appear from what follows. The company are, as I have pointed out, the owners and, in so far as regards the land as distinct from the buildings, they are the occupiers. If the lease to Brooklands Aviation, Ld., be assumed to have been the sole transaction, the first question to arise is whether the profit derived by the company from the lease in so far as it relates to the land as distinct from the buildings is covered by the sch. A or B assessments and if so which? If my reasoning is correct, it is not covered by the sch. B assessment, but is covered by the sch. A assessment for the reason that the lease is an exploitation by the company of their rights of property in the land and not an exploitation of the land itself. They are not by the lease extracting profit from the land by their own exertions such as tilling the land or by waiting for the fruits of the land to fall into their laps without exertion of their own as in the case of an apple falling from an untended apple tree. They are for an annual consideration conferring on another company something which they can only confer by virtue of their right of property in the land, namely, the right to come on the land and do certain acts on it. The matter may be tested by assuming that the company had demised the land to X and X had then (in the absence of any restrictive covenant in his lease) granted the lease to Brooklands Aviation, Ld. It appears to me that X would thereby have been exploiting the right of property vested in him under the lease, not his right as occupier. Now, if X's lease to Brooklands Aviation, Ld. had been a profitable one to him it is to be assumed as a matter of business that when X's lease came to an end, if the

Brooklands company desired to renew their agreement, the rent payable by X under a new lease would be put up and accordingly the sch. A tax which would ultimately fall on the head lessors would be increased by reason of the proved increase in annual value. In the result, the statutory profits derived from the property rights divided between the head lessors and X would bear one tax which would reflect the increased value of those rights.

If in the present case the land had been demised to the Brooklands company with appropriate restrictions on user and a power reserved to the company to grant licences to others to bring their aircraft to ground on the land there could, since the *Salisbury House* case (1), have been no question but that the sch. A assessments covered the profits derived from the lease. But it is suggested that the case is different because here the Brooklands company so far as the land is concerned are merely licensees. Does this make any difference? On principle I cannot see that it does. When the owner of land grants a licence to another to come on his land he is exercising his rights of property just as much as when he is granting a lease. It is by virtue of his proprietary rights that he has power to grant the licence and this is equally true be he freeholder or leaseholder. The fact that a licensee carries on a trade on the strength of his licence has nothing in the world to do with the owner who grants the licence. It does not convert him for tax purposes into a person carrying on a trade any more than in the case where a lessee carries on a trade. The fact that the land is peculiarly suitable for carrying on the trade whether under a lease or a licence will or should in the long run be reflected in its annual value for tax purposes. If, for instance, a person owns a piece of land contiguous to a racecourse where there is great demand for parking accommodation, the existence of the demand should in theory be reflected sooner or later in an increased assessment for the purposes of sch. A. But I cannot see on what principle the profit which the person in question makes from granting temporary licences to park motor cars on the land can be said not to be covered by the

(1) [1930] A. C. 432.

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sch. A assessment, but to fall under case I. or case VI. of sch. D. If, on the other hand, more is done than the mere granting of licences, for example, if the cars are washed or repairs effected, the profits realized by those activities will clearly fall outside sch. A.

I cannot find in any one of the company's activities anything but the exercise and exploitation of their rights of property. If the grant of one licence is merely an exercise of those rights I cannot see that the grant of half a dozen licences bears a different character. The Crown's case is that although, if there had only been one activity, the profits derived from it might have been covered by sch. A, yet taking the totality of the activities there is a trade under case I. of sch. D, or, at any rate, a profit which is not covered by sch. A and is, therefore, assessable under case VI. This argument, with all respect, appears to me to be fallacious. Nought plus nought plus nought does not equal one. If the Crown is dissatisfied at the sight of a landowner obtaining by the exercise and exploitation of his property rights a profit greater than the annual value of the land as assessed under sch. A its remedy is to obtain, if it can, a revision of the assessment and not to endeavour to force into another schedule profits which are already taxed under sch. A. In my view, the present attempt deserves to fail just as completely as did the attempt in the *Salisbury House* case (1).

I have set out the conclusions at which I have arrived on principle. But they cannot, of course, stand if the authorities forbid it, and I must now turn to a consideration of certain cases on which reliance was placed. I may begin by saying that the Crown's unsuccessful attempts in the *Salisbury House* case (1) and the *Glanely* case (2) achieved one most useful result since the decisions in those cases have shed a flood of light on much that was previously obscure in the principles governing schs. A and B in their relation to sch. D. The cases principally relied on by the Crown before us were all earlier than those decisions and must be interpreted in the light of the law as laid down in those decisions.

(1) [1930] A. C. 432.

(2) [1933] A. C. 618.

The principal case to which reference must first be made is *Coman* v. *Governors of Rotunda Hospital, Dublin* (1). There the governors of the hospital were endeavouring to obtain for the profits of the Rotunda Rooms the exemption given in favour of hospitals by para. 3 of No. VI. of sch. A, s. 61 of the Income Tax Act, 1842 (now reproduced in s. 37, sub-s. 1 (*a*), of the Income Tax Act, 1918). To make good this claim it was necessary for them to establish that the profits were profits of tenements belonging to them, i.e., that they were assessable under sch. A, that being the schedule under which the exemption was and is granted. The case seems to me to have been a clear one since, when once the nature and source of the profits were examined, it became impossible to describe them as " profits of tenements." Lord Birkenhead said (2) of the hospital that they " afford the hirers not merely a right or "licence to use the rooms, but also fixtures and fittings some of "which are clearly not part of the building but are separate "chattels, and the respondents provide certain services such "as heat, light and attendance." If I may apply my own phraseology, the profits were derived in part by the exploitation of the hospital's right of property and in part by the provision of chattels and services. Clearly, therefore, there was subject-matter for assessment under sch. D. Lord Finlay (3) puts the matter in this way. " Profits," he says, " are undoubtedly "received in the present case which are applied to charitable "purposes, but they are profits derived not merely from the "letting of the tenement but from its being let properly "equipped for entertainments, with seats, lighting, heating "and attendance. The subject which is hired out is a complex "one. The mere tenement as it stands, without furniture, "etc., would be almost useless for entertainments. The "business of the governors in respect of these entertainments "is to have the hall properly fitted and prepared for being "hired out for such uses. The profits fall under sch. D, and "to such profits the allowance in question has no application, "as they cannot be properly described as rents or profits of

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(1) [1921] 1 A. C. 1.
(2) Ibid. 8.
(3) Ibid. 18.

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"lands, tenements, hereditaments or heritages." I call attention to the words "the mere tenement as it stands "without furniture, etc., would be almost useless for entertain-"ments." As appears from the stated case there, which is printed in the report in Tax Cases (1), the governors made no attempt to apportion the profits as between the tenement itself and the other matters provided. and there would obviously have been no point in attempting to do so. In the present case there is nothing analogous to the provision of chattels and services found in the *Rotunda* case (2), and I cannot regard that case as in any way inconsistent with the conclusions at which I have provisionally arrived as above set forth. In the *Rotunda* case (2) there was, as Lord Tomlin puts it in the *Salisbury House* case (3) "utilization of the land "attributable neither to the property quality nor to the "occupation quality producing profits assessable to tax under "Schedule D."

In the *Salisbury House* case (3) reference is made in some of the opinions delivered to the fact that in the *Rotunda case* (2) the hospital remained in occupation and granted mere licences. I do not understand these passages as suggesting that there is for present purposes any difference in principle between a lease and a licence. They are, I think, directed to pointing out that in the *Rotunda* case (2) the hospital were actually carrying on activities which could only be carried on by a person in occupation, whereas in the *Salisbury House* case (3) the company had granted leases.

Before leaving the *Rotunda* case (2), I must refer to one passage in the speech of Lord Birkenhead on which the Attorney-General placed particular reliance. He says (4): "It is for that purpose that sch. B is directed to tax the "benefit of occupation where the land or tenement is not "occupied as a dwelling or warehouse or for the purpose of "carrying on a trade or business, the profits of trade or "business being assessed under sch. D." As was pointed out by Clauson L.J. in the course of the argument, this passage as reported is merely a paraphrase of sch. B, No. VII., in s. 63 of the Act of 1842 (now r. 1 of schedule B). If the actual words of the statute had been adopted the passage would have run "where the land or tenement is not occupied as a "dwelling-house and is not a warehouse or other building "occupied for the purpose of carrying on a trade." When this is appreciated the passage affords no support to the Crown's argument.

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(1) 7 Tax Cas. 517.

(2) [1921] 1 A. C. 1.

(3) [1930] A. C. 432, 462.

(4) [1921] 1 A. C. 13.

The next case which was greatly relied on was the *Carlisle and Silloth Golf Club* v. *Smith* (1). In that case the club was lessee and occupier of the golf course with its buildings and the subject-matter which it was sought to tax was the profits derived from visitors who on payment of green fees were entitled to enjoy the amenities of the club and the services provided. The main argument put forward by the club was a very narrow one (2). It claimed to be exempt from assessment because it was a members' club and was not carrying on any business. The question to what extent, if any, the profits from green fees ought to be attributed to property or occupation was not raised, no doubt, for the very good reason that without the provision of amenities and services the green fees would not have been earned at all. The judgment of Hamilton J. is directed to disposing of the argument which I have mentioned. His conclusion on it is as follows: "I think, "therefore, that at the outset the club has . . . . annexed to "its ordinary enterprise of a golf club the rendering of services "systematically to strangers for the purpose of obtaining, "among other advantages to itself, the revenue that those "strangers provide." In the Court of Appeal there are two observations which must be noted, one by Buckley L.J. and one by Kennedy L.J. (3). Buckley L.J. said: "If a land- "owner laid down upon his land a golf course and charged fees "for admission and user—if, that is to say, the links were a "proprietary golf links carried on with a view to profit— "there can be no question but that the proprietor would be "assessable." Kennedy L.J. said: "It appears to me that

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(1) [1913] 3 K. B. 75.
(2) See 6 Tax Cas. 50.
(3) [1913] 3 K. B. 75, 81.

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"this club is really carrying on the business of supplying to "the public for reward a recreation ground fitted for the "enjoyment of the game of golf." Both the lords justices were thinking of a golf club of the familiar type with amenities and services as was the case on the facts before them, and I find nothing in these expressions which is inconsistent with the views which I have provisionally stated in the present case. In any event, the point with which we have to deal in the present case was not raised or argued in the *Carlisle* case (1). But in the case of bare land, as distinct from services and the amenities of a club house, etc., I cannot myself see that a person who leases the land to others or grants licences to others to come on it is doing anything more than exploiting his own rights of property, even if the lessee or licensee is by the terms of the lease or licence entitled himself to carry on a trade on the land. If a landowner lays out his land as a cricket field and leases it to a cricket club, it cannot be suggested that the profits so derived are not covered by the sch. A assessment which can, if necessary, be raised so as to reflect the annual value of the land as so laid out. To secure the tenancy the landlord has to level the land and prepare the pitch, and it may be that in the lease he undertakes to cut the grass and keep the pitch rolled and in order. Such an undertaking would have the effect of lowering the annual value. I cannot see that it would take the case out of sch. A any more than the undertaking by the lessor of a house to keep the house in repair. If, instead of granting a lease to one club, the landowner grants licences to different clubs to play on different days of the week, what difference can it make ? I cannot find any satisfactory ground for drawing any distinction between the case of a lease and the case of a licence. The granting of the one is just as much the exercise of the ordinary rights of property as is the granting of the other. The fact that to secure the rent or the sum payable for the licence the landowner has to put and keep the land in a particular condition does not, in my view, make any difference. Any increased value in the land due to its suitability or adaptation to a particular purpose, and

(1) [1913] 3 K. B. 75, 83.

any expense incurred by the proprietor in keeping the land in such a condition as to earn profit are, it seems to me, matters to be taken into account in fixing the sch. A valuation just as they would be in the case of a house or other building. Before leaving the *Carlisle* case (1) I must observe that the decision was approved in the House of Lords in the *Rotunda* case (2). This fact was not unnaturally relied on by the Attorney-General, but the *Carlisle* case (1) was clearly being treated by the House of Lords as being, what in fact it was, a decision based on the provision of services and amenities which fell outside the scope of sch. A.

The next case relied on was *Inland Revenue Commissioners* v. *Stonehaven Recreation Ground Trustees* (3). That again was a case of a ground laid out and provided with all the necessary equipment for various games. It was not and could not have been seriously argued that the profits derived from such a concern were covered by sch. A. The substantial argument in the case appears to have been that the ground was carried on entirely for the benefit of subscribers, and was, therefore, a mutual concern. I do not find that this case assists me in the solution of the present problem. The two other cases relied on by the Attorney-General, namely, *Carnoustie Golf Course Committee* v. *Inland Revenue Commissioners* (4) and *Smith* v. *York Race Committee* (5) do not carry the matter any further. The facts were entirely different from those in the present case and the point which we have to consider did not arise.

Three cases relied on by Mr. King on behalf of the company must be mentioned. In *Elliott* v. *Burn* (6) a surface owner whose land was let to a farmer at a rack rent granted to a colliery company the right to withdraw support from the surface in consideration of annual rents. These annual rents the Crown claimed to be assessable either under r. 7 of No. II. of sch. A or under case III. or case VI. of sch. D. It was held by the House of Lords that the rents arose from the owner's property in the lands and that liability in respect of them was exhausted by the sch. A assessment. The ground of the decision (so far as now relevant) was that the right of support which the owner had given up was a natural right incident to the land itself and the payments made must be regarded as arising from the ownership of land. This decision appears to me to lend support to the views which I have ventured to express since it is an example of the exploitation (in a special manner and not by a lease of the land) of one of the owner's rights of property in the land.

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(1) [1913] 3 K. B. 75.
(2) [1921] 1 A. C. 1.
(3) 1930 S. C. 206.
(4) 1929 S. C. 419.
(5) [1934] 1 K. B. 517.
(6) [1935] A. C. 84.

The next case was *Whelan* v. *Alfred Leney & Co., Ld.* (1). This was another example of an attempt by the Crown to obtain payment of tax on rents exceeding the annual value. As in the *Salisbury House* case (2) the attempt failed. The Crown's contention was that the rent there paid was paid not for the land alone, but partly for the ties affecting the subject-matter of the demise (namely, the licensed houses) which could be separated from the property in the land. Lord Russell of Killowen pointed out (3) that " the rent is paid for the land, "the ownership of which carries with it the power to impose "a tie if the existing tenancy determines and (by abstaining "from determining the tenancy) to retain a tie if the sitting "tenant is willing to remain." This case again appears to me to be at any rate consistent with my view as to the scope of " property " under sch. A.

The last case was *Shop Investments, Ld.* v. *Sweet* (4), a decision of Wrottesley J., whose judgment, if I may say so, I have found particularly illuminating and is, in my opinion, manifestly correct. There the company, whose business was that of acquiring and modernizing properties and letting or selling the properties so modernized, had, on one occasion and contrary to their usual practice, let a cinema furnished with all its equipment and plant. Assessments were made in respect of the profits of this letting, the amount of the sch. A assessment being allowed as a deduction. The company contended (wrongly) that the profits were covered by the sch. A assessment. It also contended that the profits made by letting the furniture, etc., must be separated from the profit made by letting the cinema building itself for which purpose an estimate must be made of what part of the total rent was referable to the furniture, etc. The object of this contention was, of course, to enable the company to show that a proportionate part of the rent greater than the assessed annual value was attributable to the building itself. Wrottesley J. agreed with this contention and, in my opinion, rightly so. If the owner of a building, the assessed annual value of which is X*l.*, can let it unfurnished for X*l.* plus Y*l.*, he cannot be separately taxed in respect of the Y*l.* If, instead of letting it unfurnished, he furnishes it and lets it furnished for X*l.* plus Y*l.* plus Z*l.*, to tax him on Y*l.* plus Z*l.* would be to exact double tax in respect of Y*l.* which, as the result of the artificial measure of profits adopted under sch. A, has already in law borne tax. An apportionment such as was made in this case could, I think, have been claimed in the *Rotunda* case (1) and the *Carlisle Golf Club* case (2), and similar cases if the point had been considered, and if (what seems unlikely) any benefit could thereby have accrued to the taxpayer in those cases.

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(1) [1936] A. C. 393.
(2) [1930] A. C. 432.
(3) [1936] A. C. 402.
(4) 23 Tax Cas. 38.

I have so far ignored the one thing done by the company which, in my view, falls outside the profit-making activities with which schs. A and B are concerned, namely, the provision of tools and equipment which is a condition of the licence. Compliance with this condition cannot, in my opinion, change the whole picture and turn what would otherwise be profits covered by sch. A or sch. B into profits assessable under sch. D, any more than would be the case if, for example, under housing bye-laws the landlord of a block of flats were bound to keep fire-fighting appliances on the premises. On principle, however, whatever part of the profits made by the company ought to be apportioned to the provision of this equipment—a matter for the Commissioners—is assessable under sch. D. The point, however, is obviously too trivial to lead to any practical result.

I have given the best consideration that I can to the

(1) [1921] 1 A. C. 1.

(2) [1913] 3 K. B. 75.

authorities which, I must confess, do not appear to me to throw a particularly clear light on the point which we have to decide. I am of opinion that, on the facts of this case and in view of the absence of any provision of services (other than those of the groundsman which I have already sufficiently dealt with), use of chattels, or other matters extraneous to the land itself other than the equipment, there is no element of profit which is not exhausted by the sch. A assessment. I agree, therefore, with the conclusion of Lawrence J., but for reasons different from those which found favour with him. He considered that the profits here in question were derived from occupation and does not refer to sch. A at all. I have given my reasons for taking a different view. In the example which he gives of the tennis court he appears to regard the occupier's pleasure in using it as one of the things which are taxed. I am not satisfied as to the correctness of this view since sch. B is concerned with profits actually earned or deemed to be earned, not with pleasure which is essentially a non-profitable activity. But, however this may be, if the tennis court is let or others are given a licence to play on it, the profits so derived are, in my judgment, referable to property (whether freehold or leasehold as the case may be) and not to occupation. I should also say that Lawrence J.'s criticisms of the *Carlisle Golf Course* and similar cases cannot, in my opinion, be supported as it does not seem to me that (apart from any question of apportionment which might have arisen, but in fact did not) the profits there in question could have been held to be exhaustively taxed under sch. B any more than under sch. A. His references to repairs and the selling of petrol and ices suggest a view of the facts too unfavourable to the respondents who do not carry on any of these activities themselves. But had they done so they would, in my opinion, have been liable to tax under case I. of sch. D in respect of the profits so made, and would not, as Lawrence J. appears to think, have been covered by the assessment under sch. B any more than they would have been by that under sch. A.

I must say in conclusion that my preference for sch. A rather than sch. B as the relevant schedule is based on the view which I have ventured to express as to the basic distinction between the two schedules. If that view is unsound, I would agree that the profits now in question are profits of occupation which are exhaustively taxed under sch. B. I would dismiss the appeals.

CLAUSON L.J. Having considered the judgment of the Master of the Rolls, I am satisfied that the reasoning with which he supports his conclusions is unimpeachable, and that any judgment which I might frame would merely have to reproduce those arguments in different language. I am sure that neither du Parcq L.J., who has reached a different conclusion, nor Lawrence J., will charge me with discourtesy if in these circumstances I refrain from burdening the pages of the reports with any separate judgment, but adopt not only the conclusions of the Master of the Rolls but also his reasons as my own.

DU PARCQ L.J. The questions raised by these two appeals may be stated as follows: (1.) Do the facts found and set out in the case stated justify the conclusion come to by the commissioners " that there was a liability under sch. D " ? (2.) If the answer to the first question is in the affirmative, is the only proper inference from those facts, as the Crown contends, that tax is chargeable under sch. D, case I., and not, as the commissioners held, under sch. D, case VI. ?

Without reciting the facts, which are set out in the case, I find it necessary to summarize them shortly to show how the problem presents itself to my mind. The Sywell Aerodrome Co., Ld., to which I shall refer as " the company," is a trading corporation with, among its objects, that of acquiring, providing and maintaining aerodromes, garages, hangars, sheds, landing grounds, and other accommodation for, or in relation to conveyances and vehicles of every kind. It owns freehold land which has been laid out as an aerodrome, and equipped with hangars and garages. A licence has been granted to the company by the Air Ministry, permitting the use of this

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aerodrome "as a regular place of landing or departure for "aircraft carrying passengers for hire or reward." It was a condition of this licence that first-aid appliances should be provided by the licensees. The company receives landing fees from aircraft using the aerodromes and charges rent for its garages. It obtains a further part of its income from "rent" paid by two clubs for the privilege enjoyed by their members of using the aerodrome, and these receipts, on the view presented by the Crown, stand on the same footing as the landing fees received from the so-called "casual users of "the aerodrome." It employs a groundsman, one of whose duties it is to cut the grass, although, no doubt, he has others. The company does not itself undertake the repair of aircraft or supply petrol for them or for cars, but it has secured the provision of these services by granting to another trading company, Brooklands Aviation, Ld. (to which I shall refer as "the Brooklands company") the sole right to use and occupy a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. It has provided in some small measure for the refreshment of its patrons by giving to a third company the right to sell ice-cream on its premises; and it is rewarded for this concession by a percentage of the ice-cream vendor's takings. Finally, it has let to the Brooklands company for four years certain buildings erected on the land which are to be used for the purposes of an R.A.F. Reserve school of flying. The lease grants to the Brooklands company the right to use for the flying purposes of such a school the fields comprising the aerodrome "in common with all other users thereof." The demise is expressed to be "subject to the rights of all other "permitted users of the aerodrome for flying purposes so "that no such rights shall be granted as will prevent the "enjoyment by the tenant" (the Brooklands company) of the rights granted by the lease. It must be added that admittedly "in fixing the rent payable under the lease regard "was had to the fees which would normally be charged to the "aircraft of" the Brooklands company "for landing."

These being the facts, I have no doubt that the company is

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carrying on what would in ordinary parlance be called a business. This is by no means conclusive to show that the profits of its activities can be taxed under sch. D. In the *Salisbury House* case (1), Lord Dunedin had no doubt that the respondent company was carrying on a business, but the greater part of the profits which it derived from that business could not fall within the ambit of sch. D, because they were already franked under sch. A. It is necessary to consider, reading the relevant sections of the Act in the light of authority, whether sch. A or sch. B singly leaves, or those two schedules together leave, any profits untouched which can be brought within sch. D.

It is elementary that, income tax being a tax on income, each of the schedules imposes a tax on profits and gains, and that none of these profits and gains must be taxed twice over. Under schs. A and B, the tax is on a presumed income. In the one case it is on the profits of ownership, in the other on the profits of occupation. These profits are so far distinct that in the case of many owners who are also occupiers tax is charged under both schedules. Similarly, an owner who occupies his land and carries on a trade on it may well be liable to taxation on the profits of his trade under sch. D. If, however, he lets his land, and parts with the entire possession of it, his liability to tax is exhausted by his assessment under sch. A because all the profits which he makes, even though they are indirectly increased by the activities of trading tenants, are profits of ownership. It is his good fortune if his real income as an owner is greater than his presumed income. He may, of course, make further profits from dealings with his tenants which do not flow from ownership at all (e.g., by undertaking for reward the task of cleaning their windows), and in that case he will pay under sch. D in respect of profits derived from his trading activity, but this liability is independent of and additional to the liability which attaches to him in his capacity of owner, the latter being strictly limited by the terms of sch. A. " You "cannot, by saying that a man carries on the business of

(1) [1930] A. C. 432, 446, 447.

"owning house property, shift the method of assessing "that property for income tax from sch. A to sch. D." The quotation is from the speech of Lord Loreburn in *Smith* v. *Lion Brewery Co., Ld.* (1), and his words were cited with approval by Lord Dunedin in *Fry* v. *Salisbury House Estates, Ld.* (2).

If the company had let its aerodrome on such terms that it parted with the entire possession of it, it would be plain, on the principles which I have stated, that, whatever might be the activities of its lessees, its taxable profits would be represented by what I have called its presumed income. The case then would be exactly on all fours with the *Salisbury House* case (2). In my opinion, however, when one is considering whether this case is (if I may express myself thus briefly), a sch. A or a sch. D case, its special facts take it out of the *Salisbury House* category and bring it within the decision of the House of Lords in *Coman* v. *Governors of Rotunda Hospital* (3). There the choice had to be made between sch. A and sch. D liability. The hospital owned rooms adapted for use as concert halls or theatres. The governors let them from time to time to persons who used them as places of public entertainment. On the occasions of such lettings, the governors provided seats and they also provided heating, lighting and attendants. They remained in occupation of the rooms and continued to exercise a general control over them. It was held that their profits were assessable under sch. D. "The governors of the Rotunda," said Lord Atkinson (4), "are, in my opinion, engaged in the "business of letting for reward their rooms heated, lighted "and furnished with seats . . . . , and cleaned, managed and "regularly controlled by their servant, the keeper, . . . for the "purpose of providing through the operations of those who "take their rooms, recreation and amusement to such members "of the general public as choose to pay for admission." For a reason which will presently appear, I must also quote the next two lines: "I do not think," Lord Atkinson continued,

(1) [1911] A. C. 150, 155.

(2) [1930] A. C. 432, 444.

(3) [1921] 1 A. C. 1.

(4) Ibid. 35.

"the services thus rendered can be regarded as mere incidents "attached to the letting of the rooms themselves." At first sight there may appear to be some inconsistency between the words of Lord Loreburn, which Lord Dunedin approved in the *Salisbury House* case (1), and this statement by Lord Atkinson. When, however, proper weight is given to the concluding words of the first sentence which I have cited from Lord Atkinson's speech, the two statements are found to be entirely consistent. The owner of a theatre who leaves it in the exclusive possession of his lessee is not troubled by sch. D at all. If he remains in occupation and provides services and equipment, he may, although the rents paid by those to whom he lets the theatre constitute his sole remuneration, be chargeable under sch. D on the ground that he is carrying on the business of providing amusement to the public through the operations of his licensees.

When the facts of the present case are considered it is, I think, true to say that they differ in one respect from those of the *Rotunda* case (2). It may fairly be said that the services rendered by the company, namely, the provision of a groundsman and of first-aid appliances, are, in Lord Atkinson's words, "mere incidents attached to the letting." But the facts of this case, taken as a whole, seem to me even more strongly to support the case for sch. D liability than did those of the *Rotunda* case (2). If the governors in the *Rotunda* case (2) had provided no services except such as were incidental to the letting, but, while remaining in occupation and control of the premises, had themselves sold for the profit of the hospital tickets of admission to some at least of the patrons of those entertainments which their licensees provided, I venture to think that, according to the principles which their Lordships enunciated, the decision of the House of Lords must have been in favour of the Crown. In the *Salisbury House* case (3) Lord Atkin spoke of the *Rotunda* case (2) as deciding " That "the respondents, the governors of the hospital, used their "own premises, of which they were in occupation, for the

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(1) [1930] A. C. 432.
(2) [1921] 1 A. C. 1.
(3) [1930] A. C. 432, 458.

"purpose of carrying on a profitable trade." Lord Dunedin (1) and Lord Macmillan (2) both attached importance to the fact that the owners had remained in occupation, and Lord Macmillan referred to the receipts of the governors in the *Rotunda* case (3) as being "receipts of an enterprise quite "distinct from the ordinary receipts which a landlord derives "from letting his property." It may be noted that in this court, when counsel for the Crown in the *Salisbury House* case (4) sought to rely on the *Rotunda* case (3), Lawrence L.J. at once pointed out that there the governors remained in occupation, while in the case then before the court the company was not in occupation of the tenements which it had let. The tenants were the sole occupiers.

In the present case the company, in the view which I take of the facts, is paid money for admission and for the right to enjoy the services of the Brooklands company by those customers of the aerodrome who come to it in aeroplanes or cars with a view to the enjoyment of the facilities provided. In my opinion, such receipts are quite different from "the "ordinary receipts which a landlord derives from letting his "property," and are not profits of ownership. Whether they can be said to be profits of occupation is, no doubt, a separate question, although the answer to it may depend on similar considerations, and with it I will now deal. On this latter branch of the case, the *Rotunda* decision is not a direct authority, because in the circumstances of the *Rotunda* case (3) sch. B could have no application, but the principles which, in my opinion, it establishes may well be applicable there also.

As I understood the argument for the Crown on sch. B, it was contended that, whereas the person who occupies land for the purpose of husbandry, however great his profits, remains chargeable only under sch. B, and never comes within the ambit of sch. D unless he undertakes some profitable activity unconnected with the land, quite a different rule must be applied to the occupier of land "for a purpose other

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(1) [1930] A. C. 432, 444.
(2) Ibid. 468.
(3) [1921] 1 A. C. 1.
(4) [1930] 1 K. B. 304, 313.

"than the purpose of husbandry." Occupiers of the latter class (it was submitted) are taxed for the mere enjoyment of what is financially an unprofitable occupation, and any profits they may make as occupiers can find no shelter under sch. B, and must, therefore, seek a resting-place in their appropriate pigeon-hole under sch. D. I have no doubt that this contention is wrong, though it is, of course, true that occupation, which the law presumes to be profitable, is often in fact unprofitable. I take the law on this point from the speech of Lord Buckmaster in *Lord Glanely* v. *Wightman* (1): "It is, of course, obvious "that in some sense land is occupied for every purpose of "trade, but I think it is plain that the occupation referred to "in the schedule is an occupation which, in itself and by its "enjoyment, is the source of the income and profits to be "taxed. Nor is such occupation limited to the purpose of "husbandry, as is shown by the later part of the rule."

While it is, I think, undoubtedly wrong to say that, except in the case of husbandry, all an occupier's profits must necessarily fall outside sch. B and within sch. D, it is, in my opinion, equally wrong to suppose that all profits made by an occupier, to the making of which the occupation of land is essential, fall within sch. B. A clear case is that of the occupier of land who sets up tea-gardens in the open air. He is supplying service and selling food and drink, and it would, I think, be a misuse of language to say that his occupation of the land was "in itself and by its enjoyment" the source of his profits. Anyone who contrives to conduct on the land which he occupies a business which, if the site were enclosed by walls and a roof, everyone would call a shop, is no more immune from sch. D taxation than the normal shopkeeper. If I am right as to such cases as those, it follows that nothing can be made of the point which was strongly pressed on behalf of the company, that cl. (*b*) of the proviso to r. 1 under sch. B, which exempts from tax under that schedule "any warehouse or other building "occupied for the purpose of carrying on a trade or pro"fession," without including land not covered by buildings

(1) [1933] A. C. 618, 629.

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which is so occupied, indicates an intention on the part of the legislature that when land not covered by a building is used for the purpose of carrying on trade the profits of that trade should be taxable under sch. B alone. If once it is admitted that the profits of some trading activities pursued by an occupier of land on land on which there are no buildings are taxable under sch. D, that point loses its force.

What I have found the most difficult question in this case now presents itself for solution. On the facts found, is the company's occupation of the land "in itself and by its "enjoyment" (I again quote Lord Buckmaster) the source of its profits, in which case those profits are covered by the sch. B assessment, or is it rather true to say that the company is making profits not merely by occupying the land, or by allowing others, for reward, to share that occupation with it, but by carrying on a business on the land? When one is considering the case of lands not used for the purposes of husbandry, it appears to me that the analogy of husbandry is of little service. Husbandry, indeed, is a case apart. Nobody lives on and by the land in the same sense as the farmer. On the other hand, almost every form of trading or business activity needs some land for its exercise, though in most cases the land is covered by buildings. Apart from the case of husbandry, I am of opinion that, when once it appears that profits are being derived from the sale of goods, or from work and labour, or from any service for reward, it is impossible to regard the occupation of the land per se as the source of those profits. If the company had done no more than invite and permit aeroplanes to alight on its land and find shelter there, it would, in my opinion, be right to say that its occupation of the land was the source of its profits. Anything done by way of adapting the land for use by the invitees (e.g., the mowing of grass and levelling of run-ways) may properly be regarded as incidental or ancillary to the occupation. So far the company's case would be analogous to that of the occupier of a plot of land who clears and suitably equips a space on which he allows cyclists to leave their bicycles for reward. If, however, to pursue the analogy, the mere occupier becomes a trader, and sets himself to repair bicycles, to provide refreshment for cyclists, and to sell to them oil or such accessories as cyclists need, it is, to my mind, clear that the profits of his business as a whole will fall to be taxed under sch. D.

It may at once be objected that this is an inexact analogy, because in the present case the company sells nothing and provides nothing except services which, according to the criterion which I have adopted, are ancillary to the occupation of the land. What, it is proper to ask, will be the position if the hypothetical oocupier of my analogy, instead of himself doing repairs for, or selling goods to, the cyclists who pay him for the use of his premises, makes a profit by granting to another person (together, it may be, with the lease of an adjoining cottage) the sole right to engage in this business with them ? I have come to the conclusion that in that case he will come under sch. D liability. There are more ways than one of carrying on a trade, and one is by granting to others the right to carry on various branches of trading activity on premises occupied and controlled by the principal trader on such terms that the principal trader directly profits by those activities. A simple instance is that of the "amusement "park," to which reference was made in the argument. An occupier of land which has no natural attractions invites the public to enter it and to pay for the privilege. If the land were bare or equipped only with immobile and derelict swings and roundabouts, no one would pay to come in. Remaining in general occupation and control, he grants to a number of other persons the right to occupy (whether as lessees or licensees) portions of the land, and there to work swings, roundabouts and other devices or to sell refreshments. It could, no doubt, be argued that he was only enjoying the fruits of mere occupation, that is, granting to strangers the freedom of the land in his occupation and allowing them to make such profitable use as they could of this freedom. But, in my opinion, such an argument disregards the reality of the case. The occupier of the "amusement park" derives his income, not from his occupation of the land, but from the fact that he is himself carrying on a trade. In my opinion, he is carrying on a trade just as he would be if he engaged persons whose business it is to entertain the public to come on his land and there to provide amusement for those members of the public whom he could induce to pay him for admission. It could hardly then avail him anything to say that he was merely, as occupier, licensing entertainers and entertained alike to use the land in his occupation. I do not think that he would improve his position by receiving remuneration from the entertainers whom he licensed instead of making a payment to them. It remains true that those who pay to enter on his land are not paying merely to come in. They pay to come in and be amused. He is attracting to his land customers who pay not simply for admission but also for entertainment, services and facilities which he has made it his business to provide through the operations of others. So, in the case of this aerodrome, it must be assumed that the knowledge that petrol can be bought and repairs done is a strong inducement to the pilots of aeroplanes to accept the company's invitation to alight, and that, if no such facilities were provided, many, if not all, of them would seek some other landing-place. The business of an aerodrome proprietor is one which, in the nature of things, cannot be carried on in a space surrounded by walls and covered with a roof. If the machines used by the company's customers ran on the ground, so that all its activities could be carried on in a building, I doubt if it would have occurred to anyone to describe the income which the company is making as derived from the occupation of the land "in itself."

Dealing now with the second of the two questions before us, which was the subject-matter of the Crown's cross-appeal before Lawrence J., I am of opinion that the right conclusion from the facts found by the commissioners is that the company was carrying on a "trade" within the definition of the Act. In my opinion, we are not bound to regard the commissioners' conclusion "that there was a liability under sch. D, case VI," as a finding of fact that the company was not carrying on a trade. The question for us is whether, as a matter of law and construction, the commissioners have drawn the proper inference from their findings. I am of opinion that they have failed to do so. I know of no better way of describing the company's activities than as an "adventure or concern in "the nature of trade," and I am of opinion that the learned judge ought to have allowed the cross-appeal.

I have only to add, with regard to a subsidiary point which was argued before us, that it was, in my opinion, right in principle to allow a deduction of the sch. B assessment in arriving at the assessment under sch. D. We were referred to a statement of Lord Herschell in the House of Lords which justifies the allowance of such a deduction "because it is an "essential element to be taken into account in ascertaining "the amount of the balance of profits": *Russell* v. *Town and County Bank, Ld.* (1). I am of opinion that the contentions on behalf of the Crown, which are set out in the case stated, correctly state the method of assessment which should be adopted. In my opinion, therefore, both appeals should be allowed, and the case sent back to the commissioners that such adjustments might be made as are necessitated by the substitution of case I. for case VI. as the measure of the assessment. This opinion will not, however, affect the result of the appeal, and, in the circumstances, I may be allowed to add that I cannot but feel misgiving as to the correctness of a judgment which differs not only from that of Lawrence J., but also from that of the Master of the Rolls, in which Clauson L.J. concurs. I am none the less bound to express the view which I have formed.

Appeals dismissed.

Solicitor for Crown: *Solicitor for Inland Revenue.*

Solicitors for the company: *Oswald Hickson, Collier & Co., for Ray & Vials, Northampton.*

(1) 13 App. Cas. 418, 425.

H. C. G.

1942
Jan. 13, 14, 15, 16, 20.

DRUMMOND *v.* HAMER.

Arbitration—Two arbitrators—Default in appointment by one party—Notice to appoint within seven days—Notice that on default disputes would stand referred to other arbitrator as sole arbitrator—Failure to appoint within seven days—Validity of appointment of sole arbitrator—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 6 (*b*).

In arbitration proceedings between landlord and tenant the landlord served a notice on the tenant in which he gave the tenant the name of his arbitrator R. G. W. and required the tenant to name his arbitrator within seven days. The notice concluded " failing " which the said disputes and differences will stand referred " to the said R. G. W. alone as sole arbitrator." A copy of this notice was at the same time sent to R. G. W. No appointment was made by the tenant within the seven days and R. G. W. sat as sole arbitrator and made an award:—

Held, that there had been no valid appointment of R. G. W. as sole arbitrator under s. 6 (*b*) of the Arbitration Act, 1889, and that, even if the words quoted did constitute a valid appointment, it was made before the expiration of seven days after the service of the notice, and, therefore, that the award must be set aside.

MOTION to set aside an award.

On March 17, 1937, Major Drummond (" the landlord ") granted a lease of Cadland House, furnished, with its grounds, lodges, a gardener's cottage and woodland, to Lt.-Col. Hamer, R.M. (" the tenant "), for twenty-one years at an annual rent of 300*l*. The lease provided that : " In the event "of the demised premises or any part thereof being rendered "uninhabitable by reason of damage by fire the rent or an "appropriate portion thereof shall cease until such damage "has been made good," and also that : " If any dispute or "difference shall arise between the landlord and the tenant "touching any clause matter or thing whatsoever herein "contained . . . . then, and in every such case the dispute "or difference shall be referred to two arbitrators one to be "appointed by each party in difference in accordance with "and subject to the provisions of the Arbitration Act, 1889 (1),

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(1) Arbitration Act, 1889, s. 6 : " Where a submission provides " that the reference shall be to " two arbitrators, one to be " appointed by each party, then, " unless the submission expresses

"or any statutory modification thereof for the time being in "force . . . ." On May 5, 1937, Cadland House was severely damaged by fire, being rendered uninhabitable. The parties were unable to agree the "appropriate portion" of the rent payable under the lease, and on January 12, 1939, the landlord's solicitors sent to the tenant the following notice signed by the landlord. "I hereby give you notice that I have "this day appointed Reginald George Woolley of . . . . to "be the arbitrator on my behalf to settle by arbitration in "pursuance of the proviso in that behalf contained in a deed "dated March 17, 1937, the disputes and differences that "are now depending between us relative to the assessment "of rent payable by you by virtue of cl. 2 (10.) of the above-"mentioned deed subsequent to the date of the fire which "occurred at Cadland on May 5, 1937, and I hereby require "you within 7 days of the service of this notice on you to name "an arbitrator to act on your behalf in the matter of the said "disputes and differences, failing which the said disputes and "differences will stand referred to the said Reginald George "Woolley alone as sole arbitrator." A copy of this notice was sent by the landlord's solicitors to Mr. Woolley on the same date. The tenant failed to appoint his arbitrator within seven days after January 12, 1939, and on October 2, 1939, Mr. Woolley proceeded with the hearing of the arbitration as sole arbitrator and he made his award on November 20, 1939. The tenant moved to set aside the award on three grounds, on only one of which this case is reported. That ground was that the landlord never had the right to appoint a sole arbitrator and never in fact did so, and that Mr. Woolley assumed to act as sole arbitrator without having the right to do so.

"a contrary intention . . . . (*b*) "If, on such a reference, one "party fails to appoint an arbitrator, either originally or by way "of substitution . . . . for seven "clear days after the other party, "having appointed his arbitrator, "has served the party making "default with notice to make the "appointment, the party who has "appointed an arbitrator may "appoint that arbitrator to act "as sole arbitrator in the reference, "and his award shall be binding "on both parties as if he had been "appointed by consent."

Gerald Gardiner for the tenant. The appointment by the landlord of Mr. Woolley as sole arbitrator, which purported to be under s. 6 (*b*) of the Arbitration Act, 1889 (1), was bad, and therefore, Mr. Woolley had no power to sit as sole arbitrator and his award should be set aside. The appointment was bad because by s. 6 (*b*), a party can only appoint his own arbitrator as sole arbitrator after the expiration of seven clear days and default of appointment by the other party. Here the landlord appointed on January 12, the date of the notice, before the expiration of the seven days. In *In re Franklin and Swathlings Arbitration* (2) Maugham J. said: "The Arbitration Act, 1889, is, in my view, a technical "statute; it is a statute which provides for the ousting of "the jurisdiction of the court; the language of it has "to be carefully observed." The arbitrator of the party giving notice does not automatically become sole arbitrator on the default of the other party, but has to be then appointed.

Macaskie K.C. and *B. L. O'Malley* for the landlord. Mr. Woolley was properly appointed sole arbitrator, and the notice given on January 12 was that prescribed by Form 15 of the Encyclopedia of Forms and Precedents, 2nd ed., vol. i., p. 544. The landlord having appointed his arbitrator, the next pre-requisite under s. 6 (*b*) of the Act of 1889 was to serve the tenant with notice thereof and to require him to appoint his arbitrator within seven days. This the landlord did. The next pre-requisite was that seven days should have elapsed without appointment. In fact, the tenant never effectively appointed. The landlord could then at any time, by parol or conduct or in writing appoint his arbitrator sole arbitrator. This he had done contingently by the notice of January 12 on the failure of the tenant. No particular mode of appointment is provided in sch. I. to the Act: see Russell on Arbitration, 13th ed., p. 595.

Gardiner replied.

Cur. adv. vult.

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(1) See note (1), ante p. 352.

(2) [1929] 1 Ch. 238, 241.

1942. Jan. 20. ATKINSON J. [having stated the facts and dealt with the other points raised :] There is a further difficulty in the way of the landlord : he never did appoint Mr. Woolley as sole arbitrator. The terms of s. 6 (*b*) of the Arbitration Act, 1889, are clear, and under it the party who desires his arbitrator to act as sole arbitrator is required so to appoint him, and he can only do that after the other party has failed to appoint his arbitrator for seven clear days after the service of the notice upon him requiring him to do so. These two points are emphasized in Russell on Arbitration, 13th ed., p. 127. When I asked counsel for the landlord the question " when did the landlord appoint Mr. Woolley sole "arbitrator ? " his answer was that the sending on behalf of the landlord to Mr. Woolley of a copy of the notice which was served on the tenant on January 12, 1939, the date on which the seven days began to run, was a sufficient compliance with the section : and the words " failing which the "said disputes and differences will stand referred to the said "Reginald George Woolley alone as sole arbitrator," were put forward as constituting the appointment of Mr. Woolley as sole arbitrator. How can it be said that the mere statement : " I have told the tenant that, if he does not appoint "an arbitrator within seven days, these differences will stand "referred to you as sole arbitrator," was an appointment of Mr. Woolley as sole arbitrator ? It was a mere misstatement on a matter of law. Even if it constituted an appointment, it was made before the expiration of the seven clear days after the service of the notice. It is to be observed that Mr. Woolley has not suggested that he was appointed as sole arbitrator. His view of the law was that, if the tenant did not appoint an arbitrator, automatically he became entitled to proceed as sole arbitrator. The award, therefore, must be set aside.

Award set aside.

Solicitor for tenant : *William P. Webb.*
Solicitor for landlord : *Boodle, Hatfield & Co.*

W. L. L. B.

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Dec. 16, 17, 19.

B. MORRIS, LIMITED *v.* LUNZER.

Revenue—Purchase tax—Liability to—Vendors wholesale manufacturers—Purchaser not a retailer—Delivery after October 21, 1940*—Previous appropriation or application of goods to contract—Finance* (*No.* 2) *Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 25, *sub-s.* 1.

In January, 1940, wholesale manufacturers entered into a contract to make certain furniture and sell it to a purchaser other than a retailer. Payment was to be made in full before delivery, and the furniture was to be ready for delivery in March, 1940. The furniture was ready in March, but the purchaser could not accept delivery then as she was unable to find living accommodation. In September, the purchaser agreed to pay for the fire and war risk insurance on the furniture. On October 21 the Finance (No. 2) Act, 1940, which rendered purchase tax payable on the sale of certain goods, including furniture, came into force. In November, the purchaser having paid for the furniture, and all charges relating to it, the furniture was delivered. In July, 1941, the vendors paid to the Customs authorities purchase tax in respect of the sale :—

Held, that, the furniture had not been appropriated or applied to the contract within s. 25, sub-s. 1, of the Act until the date of delivery, that purchase tax became due on that date, that the vendors were bound to pay it, and that they were entitled to recover it from the purchaser.

APPEAL from Judge Engelbach at Shoreditch county court.

In January, 1940, the defendant entered into a contract with the plaintiffs, wholesale manufacturers of furniture, for the sale by them to her of certain furniture which they were to manufacture. The price was 135*l.*, the whole of which was to be paid before the goods were delivered. The furniture was to be ready for delivery to the defendant on March 18, 1940, she agreeing to pay carriage charges. It was ready for delivery on that date, but although the defendant was requested by the plaintiffs on several occasions to take delivery, she did not do so, as she could not find living accommodation. The plaintiffs meanwhile kept the furniture, but without there being any contract of bailment. On September 11, 1940, the defendant agreed to pay for the fire and war risk insurance on the furniture. On October 21, 1940, the Finance (No. 2) Act, 1940, came into force. On November 4 the furniture was delivered by the plaintiffs, the defendant having already paid them the whole of the purchase price, insurance costs and carriage charges due, except the sum of 23*l.* 13*s.* 2*d.*, for which the plaintiffs accepted her post-dated cheque which was duly honoured. On July 26, 1941, the plaintiffs paid 47*l.* 10*s.* 7*d.* to His Majesty's Customs for purchase tax demanded in respect of the transaction, and this sum they sought to recover from the defendant in these proceedings. The county court judge found that the defendant was liable, and he gave judgment accordingly. The defendant appealed.

Lloyd-Jones (*G. Willett* with him) for the defendant. The defendant denies that the plaintiffs have any right to pass on the purchase tax. Her case is that delivery was made in March, 1940, before the purchase tax became chargeable under the Finance (No. 2) Act, 1940, and she relies on s. 18 of the Act. Under the contract the goods were to be completed for delivery in March, 1940, and the only reason they were not delivered was that the defendant had failed to secure a house. The plaintiffs several times pressed the defendant to take delivery. and it can make no difference that the goods were not received till November, 1940, although the tax became payable as from October 21, 1940. By s. 18 tax is to be charged on all chargeable goods bought under chargeable purchases. There is no doubt that the goods here were chargeable goods under sch. VII., but a chargeable purchase is defined in s. 18, sub-s. 2, as any purchase made from a registered wholesale merchant or manufacturer selling by wholesale goods in the United Kingdom. Selling by wholesale is defined in s. 41, sub-s. 1, as meaning the selling of any goods of any class to a person carrying on the business of selling goods of that class. That has no application here as the defendant was buying the furniture for her own use. Sect. 37, which is directed to catching forestalling payments, goes no further back than July 2, 1940, and if delivery had been made in March it would have had no bearing. The plaintiffs rely on s. 25, sub-s. 2, which provides that "where a wholesale merchant or manufacturer who is "required by this Act to be registered appropriates or applies

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"any chargeable goods . . . . either (*a*) to the purposes of any "business carried on by him of selling chargeable goods by "retail . . . . (*c*) to any other purpose not being a sale of the "goods under a purchase which is a chargeable purchase . . . . "the appropriation or application shall be treated . . . . as if it "were a chargeable purchase," and tax becomes due at the time of the appropriation or application. That might apply here if the appropriation or application had been made later, but tax cannot become due if the appropriation or application was made in March, months before the Act came into force. Sect. 25 does not contemplate an appropriation or application before the Act. That the property in the goods passed in March is shown by the fact that the defendant has been charged for insurance of the goods while they remained on the plaintiff's premises. The action is based on s. 28, sub-s. 1, which depends on s. 18, not on s. 25. The date which has to be considered is the date of appropriation, not the date of delivery.

Bernard Lewis (*Gallop* with him) for the plaintiffs. The plaintiffs were compelled to pay the tax. Appropriation or application can only be contemplated where something definite has been done, such as delivery. There must be some finality to meet the change contemplated by s. 25, sub-s. 2, and in this case finality was only reached on the delivery of the goods. The plaintiffs became liable to pay the tax when the Act came into force, and they are entitled to recover the amount paid from the defendant.

Lloyd-Jones replied.

Cur. adv. vult.

1941. Dec. 19. LORD GREENE M.R. read the following judgment of the court (LORD GREENE M.R., CLAUSON and GODDARD L.JJ.): This appeal raises a question of some difficulty upon the construction of Part V. of the Finance (No. 2) Act, 1940, by which purchase tax was imposed. [His Lordship stated the facts.] Before turning to the Act, it is convenient to state the contractual position between the parties as we see it. Under the terms of the original contract, the property in the goods was not intended to pass until payment in full of the amount due. On March 18, the goods were ready for delivery in accordance with the contract and the defendant was bound to pay for them and take delivery on that date, but, although the plaintiffs had ready for delivery goods earmarked for the contract, there was no consensual identification of those goods as the contract goods and it would, we think, have been open to the plaintiffs to deliver any goods of their manufacture of the kind specified in the contract. On September 11, however, the goods which the plaintiffs had earmarked became, we think, consensually allocated to the contract, and thereafter the plaintiffs could only perform their contract by delivering those specific goods. Nevertheless, although the contract goods thus became ascertained, this did not operate to pass the property and did not affect the original contract under which the property was only intended to pass on payment. It is to a transaction involving these four stages, namely, the original contract in January, 1940; the completion of the goods ready for delivery on March 18, 1940; the allocation by agreement of ascertained goods to the contract on September 11; and payment and delivery on November 4, 1940; that the provisions of the Act have to be applied.

The date prescribed for the coming into operation of the purchase tax was October 21, 1940, and the sole question in the case is whether or not the event, which under the Act causes purchase tax to become due, took place before that date. It is the application of the language used to describe that event to the facts of the case which gives rise to the difficulty. The defendant argued that the event in question was the completion of goods ready for delivery under the contract on March 18, 1940, or alternatively, the consensual ascertainment of the contractual goods on September 11, 1940. The plaintiffs, on the other hand, say that the event was the delivery of the goods on November 4, 1940. As will appear, the question is a nice one.

The scheme adopted by the legislature for the imposition and collection of purchase tax is (so far as relevant) in its main outlines as follows. The tax is charged in respect of

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specified classes of goods which are bought under what are called "chargeable purchases": s. 18, sub-s. 2; from a registered wholesaler or manufacturer, who is chargeable with the tax: s. 22, sub-s. 1 (*a*); but passes it on to the buyer: s. 27. The tax is charged on the wholesale value. A "chargeable purchase" is a purchase from a wholesale merchant or manufacturer selling by wholesale: s. 18, sub-s. 2 (*a*); that is to say, selling to a retailer: s. 41, sub-s. 1. The tax is chargeable on all purchases of the kind described, whether made before or after the passing of the Act, but, save in certain cases mentioned in s. 37, it is not chargeable when the goods have been delivered before the date to be specified for the coming into operation of the Act: s. 18, sub-s. 3; that is to say, October 21, 1940. The tax where chargeable becomes due on delivery of the goods under the purchase: s. 22, sub-s. 2.

So far, the provisions of the Act may be summarized by saying that the wholesaler is accountable for the tax to the revenue, but the tax does not become payable until the completion of the transaction between the wholesaler and the retailer by delivery of the goods, the fact that the property may have passed at an earlier date being treated as irrelevant. In other words, the tax becomes payable at the end of what may be called the wholesale stage and not before.

But if the incidence of the tax had been limited to the ordinary case of a sale by a wholesaler to a retailer, many transactions which did not fall within that description would have escaped taxation. The problem, therefore, was to make the tax applicable to those transactions while preserving the machinery by which the wholesaler is accountable for the tax and the tax becomes due from him at a defined and appropriate time. Sect. 25, sub-s. 2, is designed to meet such cases. Its provisions, so far as relevant, are as follows: "Where "a wholesale merchant or manufacturer . . . . appropriates or "applies any chargeable goods in his ownership . . . . or, in "the case of a manufacturer, any chargeable goods which "have been made by him . . . . either (*a*) to the purposes of "any business carried on by him of selling chargeable goods

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"by retail . . . ., or (*b*) to the purposes of any business carried "on by him of letting out chargeable goods on hire, or (*c*) to "any other purpose not being a sale of the goods under a "purchase which is a chargeable purchase . . . . the appropria-"tion or application shall be treated for the purposes of this "part of this Act as if it were a chargeable purchase, he shall "be accountable for the tax chargeable in respect of the "goods, and the tax shall become due at the time of the "appropriation or application." By these provisions the machinery of the tax is adapted to these special classes of transaction. The wholesaler is accountable for the tax, and the point of time selected for the tax to become due as comparable to the date of delivery in the case of a sale to a retailer is the time of the appropriation or application to the particular purpose in question in any individual case.

In the present case the defendant was not a retailer. Accordingly, the purchase by her was not a chargeable purchase under s. 18, and the due date for payment of the tax was not the date of the delivery of the goods under s. 22, sub-s. 2 (*a*). Her case falls under the words "to any other purpose not being "a sale of the goods under a purchase which is a chargeable "purchase" already quoted from s. 25, sub-s. 1 (*c*), and the tax became due at the time when the plaintiffs appropriated or applied the goods to the purpose of the contract. The question, therefore, is: What, having regard to the facts of the case, was the time of such appropriation or allocation?

Some general observations may be made with regard to s. 25. First, the time when the tax becomes due is not fixed by reference to the date when the property passes, and the word "appropriation" is not used in reference to any rule for ascertaining the intention of parties to a contract for the sale of goods as to when the property shall pass. This appears clearly from the circumstance that the section applies to cases (which probably form the majority of the cases to which it applies) where there is no question of property passing at all. In cases falling under the section where property does pass, the date of the passing of the property does not fix the date when the tax becomes due any more than it does in the case of a sale to a retailer where the date fixed is the date of delivery of the goods. Secondly, the words "appropriates "or applies" are words of quite general import chosen as suitable to describe a variety of transactions. In the case of any particular transaction the problem is to find the particular stage in the transaction to which they most sensibly apply having regard to the facts of the case. Thirdly, the scheme of the section is, as it appears to us, to fix a point of time comparable or analogous to that at which, in the normal case of a sale to a retailer, the goods are to be regarded as passing out of the wholesale stage. In the typical case of a wholesaler who has a retail business, the point of time selected is that at which he does some act in relation to his goods which indicates that he has ceased to be a wholesaler and has become a retailer in regard to them. Such a case would be where he places the goods in his retail shop or dispatches them for the purpose of being so placed. Lastly, whatever the words "appropriates or applies" may mean in relation to the facts of any individual case, they point to some final and unconditional act.

Having regard to these considerations, it is, we think, legitimate, in a case under s. 25, sub-s. 1 (*c*), which happens to be a sale, to expect to find that the date chosen for the tax to become due will be truly comparable to the date of delivery chosen for the case of chargeable purchases on retail sales, that is, that it will be the date of delivery itself. It would be strange to find that the tax in such a case as the present should be payable at an earlier date than it would have been if the purchaser had been a retailer instead of a private individual. If the word which refers to such a case as the present is the word "applies," as we think it is, the word "appropriates" being more suitable for the transactions mentioned in paras. (*a*) and (*b*), it seems to us to be clear that on the facts there was no "application" of the goods to the purposes of the contract until they were actually delivered. Down to that date they were earmarked for the contract and identified as being the contractual goods, but they had not been "applied" to the purposes of the contract. If,

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however, the word is "appropriation," we do not find sufficient finality in what was done down to the date of delivery to satisfy that requirement. The plaintiffs were not going to deliver the goods until they received payment. Down to the date of actual payment, it was not certain whether or not the contract would be performed. The defendant might have repudiated it and the goods might have been left on the hands of the plaintiffs. The plaintiffs were still keeping their hands on the goods, as they were entitled to do, and although they were "appropriated" to the contract in the general sense that the contract became a contract relating to specific goods, they were not, in our opinion, in the particular sense of the section "appropriated to the purpose of "the contract," a state of affairs which could only come about when the hands of the plaintiffs were finally removed from the goods.

For these reasons we are of opinion that the date of appropriation or application of the goods to the purpose of the contract was November 4, 1940, the date of delivery, that the tax charged became due on that date, that the plaintiffs were bound to pay it, and that, accordingly, they are entitled to recover it from the defendant. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors for defendant: *Pattinson & Brewer.*
Solicitors for plaintiffs: *Alexander Fine, Hawkins & Co.*

P. J. B.

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Jan. 19, 20.

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BENSON *v.* COUNSEL (INSPECTOR OF TAXES).

Revenue—Income tax—Profits or gains—Stallion bought by subscribers—Sale of nominations by subscriber—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. D, case VI.*

Race-horse owners, in pursuance of a written agreement, subscribed a sum for the purchase of a stallion and for working capital. The subscribers were entitled to send mares to the stallion free in proportion to the number of their shares. The management of the horse, which was not kept on the land of any of the subscribers, was left in the hands of a committee. Some of the subscribers did not have mares which were considered suitable by the committee, or did not want to send their mares to the stallion, and they were entitled to sell their nominations to other persons. The receipts from the sale of nominations by two of the subscribers were assessed under case VI. of sch. D to the Income Tax Act, 1918, by the Special Commissioners, who found that the subscribers in question were not carrying on a trade:—

Held, that the principle to be applied, there being a finding that there was no trade, was to ascertain whether or not the receipts in question were in the nature of income; that there had been no purchase and re-sale of property, but a user of property purchased; and that the receipts resulting from it were in the nature of income.

Principle in *Cooper* v. *Stubbs* (1) applied.

APPEALS from the Special Commissioners of Income Tax.

By a written agreement, made in 1932, twenty-four owners of racehorses subscribed 53,000*l.*, being 47,000*l.* for the purchase of the stallion, Solario, at stud, and 6000*l.* working capital. Each owner took shares in the ownership of the horse, each being entitled to send mares to Solario free in proportion to the number of their shares. The management of the horse was left in the hands of a committee who were empowered to regulate the number of mares which Solario might serve, the price at which he was to stand, and the suitability of the mares which might be sent to him. The horse was not kept on the land of any one of the subscribers. Some of the subscribing owners did not have mares which were considered suitable, or had mares which they did not want served by Solario, and these owners were able to sell their free nominations to other persons, who possessed mares which were suitable and acceptable to the committee. The appellants were two of these owners, and the question raised was whether or not over the six years, 1934 to 1940, the receipts which they had received for the sale of their nominations to Solario were taxable under case VI. of sch. D. The Special Commissioners held that they were so taxable, although they found that neither of the appellants was carrying on a trade.

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(1) [1925] 2 K. B. 753; 10 Tax Cas. 29.

Reported by C. G. Moran, Esq., Barrister-at-Law.

Bowe for the appellants. This stallion was not on the land of any subscriber. Schedule B, therefore, was inapplicable. If these receipts were taxable, they were so under sch. D. Had the commissioners found that the appellants were carrying on a trade, there would have been a taxable result from a taxable source under case I. But the commissioners found that the appellants were not carrying on a trade and so there was no taxable source. There is no income tax fruit except from an income tax source. In *Leeming* v. *Jones* (1) Lawrence L.J. said: "It seems to me that, in "the case of an isolated transaction of purchase and re-sale "of property, there is really no middle course open. It is "either an adventure in the nature of trade, or else it is simply "a case of sale and re-sale of property." That is so also where, as here, there are a series of isolated transactions found not to constitute a trade. This was a case of the purchase and re-sale of property, for the nomination to a horse is property, and the receipts were an accretion of capital: see *Pearn* v. *Miller* (2) and *Jones* v. *Leeming* (3), in which *Pearn* v. *Miller* was approved. The receipts, therefore, cannot be taxed under case VI. [*Martin* v. *Lowry* (4) also was cited.]

(1) [1930] 1 K. B. 279, 302; 15 Tax Cas. 333, 354.

(2) (1927) 11 Tax Cas. 610.

(3) [1930] A. C. 415; 15 Tax Cas. 333.

(4) [1927] A. C. 312; 11 Tax Cas. 297.

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Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. These transactions clearly did not constitute a purchase and re-sale of property, and, therefore, they are not covered by the decisions in *Pearn* v. *Miller* (1) and *Jones* v. *Leeming* (2). There was merely a user of property resulting in receipts which are of the nature of revenue or income, the horse being used to produce those receipts: see *Cooper* v. *Stubbs* (3).

Bowe replied.

LAWRENCE J. The argument for the appellants is based on the decisions in *Pearn* v. *Miller* (1) and *Jones* v. *Leeming* (2), and, in particular, on the dictum of Lawrence L.J. in the latter case, when he said: "It seems to me that, "in the case of an isolated transaction of purchase and re-"sale of property, there is really no middle course open. It "is either an adventure in the nature of trade, or else it is "simply a case of sale and re-sale of property" (4). It is conceded that the facts here do not show an isolated transaction, but counsel for the appellants has contended that the transfer of these nominations to other persons in return for money is a purchase and re-sale of property within the meaning of the dictum of Lawrence L.J., and that, therefore, as the commissioners have found that there was no trade carried on, the profits cannot be taxed under case VI. To this argument counsel for the Crown has replied that the facts show, not a purchase and re-sale of property, but merely the user of the property which the subscribing owners acquired in Solario, and that the receipts derived from the user are in their nature revenue or income. Counsel for the appellants, in reply, contended that this was not the true view, because the rights of the appellants were not the unfettered rights of the owners or part owners, but were limited to a considerable extent by the terms of the agreement made between the owners.

In my opinion, the argument for the Crown is correct.

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(1) 11 Tax Cas. 610.

(2) [1930] A. C. 415.

(3) [1925] 2 K. B. 753.

(4) [1930] 1 K. B. 279, 302.

As appears from the authorities, where the commissioners have found that there is no trade, the true question to be considered is whether the receipts in question are of the nature of income or revenue. That is indicated in *Ryall* v. *Hoare* (1) where Rowlatt J. said: "First, anything in the nature of "capital accretion is excluded as being outside the scope "and meaning of these Acts, confirmed by the usage of a "century. For this reason, a casual profit made on an "isolated purchase and sale, unless merged with similar "transactions in the carrying on of a trade or business is not "liable to tax. 'Profits or gains' in case VI. refer to the "interest or fruit as opposed to the principal or root of the "tree" (2). Those observations seem to me to be applicable to this case, for the facts here do not show an accretion of capital. These receipts, therefore, were in the nature, not of capital, but of interest, being the fruit of the tree. The receipts in *Ryall* v. *Hoare* (1), which were commissions earned for guaranteeing an overdraft, were held to be taxable. In *Pearn* v. *Miller* (3) the subject had bought seven pieces of real property, subsequently reselling them at a profit and, the commissioners having found that he was not carrying on a trade, the question was whether the accretion in value of those properties was taxable under case VI. Rowlatt J. said: "I wish to say very clearly, in order that I may be "corrected if I am wrong, that I think it is very often the case "that you may say of something that it may be under case I. "or case VI. That may very often be true, but it is wholly "illusive to say anything of that kind where you are dealing "with a difference between the purchase and sale price of "goods. If it is desired to tax the difference between what "a man has bought goods for, or property for, and sold them "for, you can only tax it, in my judgment, if you can say "that what he did was a trade or adventure or concern in the "nature of trade. I think you cannot get under case VI. "a tax out of appreciation of property; you have to get it "under case I." (4). Rowlatt J. was there dealing with

(1) [1923] 2 K. B. 447.
(2) Ibid. 454.
(3) 11 Tax Cas. 610.
(4) Ibid. 613.

the purchase and re-sale of real property, but it is clear from what he said, that the same argument applies to the purchase and re-sale of goods.

In my opinion, however, there is nothing like a purchase and re-sale of goods or of any other property to be found in the transactions which gave rise to the receipts in question in the present case. The appellants did not buy the right to their nominations. They bought the horse. It is accurate to say that they sold the right to the nominations, but that was merely a way of realizing the fruit of the purchase of the horse. In *Jones* v. *Leeming* (1), another case of the purchase and re-sale of real estate, the Law Lords put the matter in very much the same way, though they referred to the dictum of Lawrence L.J. which I have quoted. Lord Buckmaster said: "Can the profits made in this case be described as "income? Were the respondent a company promoter or "were his business associated with purchase and sale of "estates, wholly different considerations would apply, but "this is negatived; the transaction in this case stands isolated "and alone. It is, to my mind, in the circumstances, purely "an affair of capital. I can see no difference between it "and what might have happened had the respondent bought "shares in two companies which were going to be amalgamated, "and then sold equivalent shares in the amalgamated company "at a profit; an accretion to capital does not become income "merely because the original capital was invested in the "hope and expectation that it would rise in value; if it does "so rise, its realization does not make it income" (2). Lord Warrington, who had been a party to the decision in *Cooper* v. *Stubbs* (3), said about that case what, in my opinion, lays down the true principle: "The nature of the profit must "in each case be considered. If it arises from a trade within "the definition in the Act, no difficulty occurs. If it does not, "I know of no better criterion than that adopted by the "majority of the Court of Appeal in *Cooper* v. *Stubbs* (3) and

(1) [1930] A. C. 415.
(2) Ibid. 419.
(3) [1925] 2 K. B. 753.

"by Lawrence L.J. in the present case. This is expressed by "Atkin L.J. in *Cooper* v. *Stubbs* (1) as follows: ' "Annual profit " ' "or gain" . . . . to my mind must mean something which "'is of the nature of revenue or income.' " (2). In *Cooper* v. *Stubbs* (1) the Court of Appeal were concerned with transactions entered into by cotton brokers for dealing in futures in cotton, and they held that, although the commissioners had found there was no trade being carried on by the brokers, the transactions in question being carried out privately and apart from their firm, yet they were taxable in respect of the receipts which they derived therefrom under case VI. because they were of a revenue or income nature. It is clear from the judgment that, although it was not the intention of the brokers that they should take delivery of the cotton, the contracts which they made were real, enforceable and legal contracts by virtue of which they might have had to take delivery of the cotton. If, therefore, the dictum of Lawrence L.J. in *Leeming* v. *Jones* (3) has the full effect claimed for it by counsel for the appellants in the present case, it would have been impossible for the Court of Appeal to have arrived at their decision in *Cooper* v. *Stubbs* (1), which was approved by the House of Lords in *Jones* v. *Leeming* (3).

The true principle applicable here is that laid down in *Cooper* v. *Stubbs* (1), namely, that where there is no trade it must be seen whether the receipts are of an income or revenue nature, and, if they are, they can be taxed under case VI. although they may be said to be from some aspects the purchase and re-sale of property. In the case before the court the transactions in question were not a purchase and a re-sale of property, but were merely a realization of the reproductive faculties of Solario. There was no purchase of the nominations which were sold. The only purchase into which the appellants entered was that of the horse itself. For these reasons, in my opinion, the decision

(1) [1925] 2 K. B. 753, 775.
(2) [1930] A. C. 415, 425.
(3) [1930] 1 K. B. 279, 302.

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of the commissioners was correct and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Ward, Bowie & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

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Jan. 20.

BRAMWELL *v.* BRAMWELL.

Husband and wife—Recovery of property—County court—Procedure—Originating application—Tenancy—Creation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75) *ss.* 12, 17—*County Court Rules*, 1936–1940, *Or.* VI., *r.* 4, *sub-r.* 1.

A husband left his wife who had been living with him in a freehold house which he owned. On a summons by the wife for desertion, justices ordered the husband to pay her 1*l.* 12*s.* a week maintenance, but intimated that he need pay only 1*l.* a week as long as she lived in the house. On October 23, 1940, the husband gave the wife notice to quit and deliver up possession of the house by November 4, 1940, but she did not do so and he continued to pay her 1*l.* a week until October, 1941, when he issued a summons in the county court claiming possession:—

Held, that no relationship between the husband and the wife of landlord and tenant was to be inferred from these facts.

Per Goddard L.J. *Semble*, proceedings for the recovery of land are in their essence an action for tort and therefore by virtue of the express provisions of s. 12 of the Married Women's Property Act cannot be brought in any court by a husband against his wife. Where the husband desires to dispute the title of his wife to land or premises or her possession thereof in the county court, he should bring the matter before the court by an originating application under Or. VI., r. 4, sub-r. 1, of the County Court Rules, 1936–1940.

APPEAL from Judge Allsebrook at Barrow-in-Furness county court.

On August 31, 1940, James Bramwell left his wife, Eliza Bramwell, who had been living with him in a freehold house which he owned. On October 21, 1940, on a summons by

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the wife for desertion, justices ordered the husband to pay to her 1*l.* 12*s.* a week maintenance, but intimated that he need pay only 1*l.* a week so long as she lived in the house. By a letter written by the husband's solicitors on October 23. 1940, he gave her notice to quit and deliver up possession by November 4, 1940. She did not do so, and he continued to pay her 1*l.* a week. On October 9, 1941, the county court judge, on a summons by which the husband claimed possession of the house, found that a tenancy of the house at a rent of 12*s.* a week had been created by the conduct of the parties; that notice to quit had been given by the letter of October 23, 1940, but that rent had been accepted for eleven months after the notice had expired, and that the notice had, accordingly, been waived; and that the tenancy was protected by the Rent and Mortgage Interest Restrictions Act, 1939. The county court judge, therefore, refused an order for possession and gave judgment for the wife. The husband appealed.

Dare for the husband. [GODDARD L.J. The form of these proceedings seems misconceived. They are to recover possession, like the old action of ejectment. By this form of proceeding the husband is proceeding against the wife for tort, which, by s. 12 of the Married Women's Property Act, 1882 (1), he cannot do. This is one of those questions between a husband and wife as to property which ought to be decided in a summary way under s. 17 of the Act, and it should be possible to bring it before the court by some proceeding other than this.] Provision for commencing proceedings in the county court by originating application is made by Or. VI., r. 4, sub-r. 1, of the County Court Rules, 1936–1940 (1). Rules prescribing exact procedure used to be in force, but were repealed in 1936. At present there are no county court rules determining precisely how the matter ought to come before the court. The point, however, was not taken in the county court on behalf of the wife, and the ordinary plaint as it stands ought to be adequate. Therefore, the point ought not to be allowed to be taken on behalf of the wife in this court. On the facts, the husband did nothing which he was not strictly entitled to do. He did not create a tenancy, and in paying the reduced amount of 1*l.* a week, simply did what the justices said he might do. This appeal should, therefore, be allowed.

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(1) By Married Women's Property Act, 1882, s. 12: "Every "woman, whether married before "or after this Act, shall have in "her own name against all persons "whomsoever, including her husband, the same civil remedies ". . . . for the protection and "security of her own separate "property, as if such property "belonged to her as a feme sole, "but, except as aforesaid, no "husband or wife shall be entitled "to sue the other for a tort."

Sect. 17: "In any question "between husband and wife as to "the title to or possession of "property, either party . . . . may "apply by summons or otherwise "in a summary way to any judge "of the High Court of Justice ". . . . or (at the option of the "applicant irrespectively of the "value of the property in dispute) ". . . . to the judge of the county "court of the district . . . . in "which either party resides, and "the judge of the High Court of "Justice or of the county court . . . . "(as the case may be) may make "such order with respect to the "property in dispute, and as to the "costs of and consequent on the "application as he thinks fit, or "may direct such application to "stand over from time to time and "any inquiry touching the matters "in question to be made in such "manner as he shall think fit: . . ."

Fortune for the wife. After the justices' order the husband could either have paid the 1*l.* 12*s.* a week and taken proceedings for ejectment, or paid 1*l.* a week and allowed his wife to stay. He did not do either of these things. He gave her notice and, when she did not comply with it, he paid her 1*l.* a week. By so doing he waived any notice which may have been contained in the letter from his solicitors, and by his course of conduct he created a tenancy. The judgment of the county court judge was correct, and this appeal should be dismissed.

LORD GREENE M.R. stated the facts substantially as set out above, and continued: The county court judge took the view that the husband and the wife by their conduct had created a contract between them for the tenancy of the house, unfurnished, at a rent of 12*s.* a week. In my opinion that finding cannot stand as there is no evidence to support it.

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(1) By County Court Rules, 1936–1940, Or. VI., r. 4, sub-r. 1: "Any proceedings authorised to "be commenced in a county court "and not required by any Act or "rule to be commenced otherwise, "may be commenced by originat-"ing application."

It is said that the tenancy is to be inferred from the fact that the husband allowed the wife to remain in the house and took advantage of the suggestion of the justices and deducted 12*s.* a week from the sum which he had been ordered to pay. That, and the length of time during which that was done, are the only grounds on which it is suggested that a tenancy came into existence. In my opinion, it is impossible to infer the relationship of landlord and tenant from those facts. The justices did not purport to, and could not, create by their order any relationship of landlord and tenant, and it seems to me impossible to say, when the husband did no more than take advantage of the suggestion of the justices, that he was thereby changing the relationship between himself and his wife with regard to the house into something which it had not been before, namely, a relationship of landlord and tenant. The fact that the matter went on for a considerable time appears to me to make no difference. The husband was entitled to continue to carry out the suggestion of the justices for as short or as long a time as he pleased, and to suggest that by carrying it out for so many months he thereby of necessity changed the relationship between him and his wife into one of landlord and tenant seems to be unwarranted. Therefore, in my opinion, the appeal must be allowed and an order for possession made.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree. I want only to add one word on a matter which I raised during the argument, and also on a point which Mr. Dare made as to the effect of treating this as a summons under the Married Women's Property Act, 1882. An action for the recovery of land is the modern equivalent of the old action of ejectment. That action was a personal action and could only sound in damages. Then in favour of this class of remedy the courts determined that the plaintiff was entitled to recover as collateral and additional relief possession of the land itself (see Stephen on Pleading, 3rd ed., p. 12), but it was in fact always a species of

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the action of trespass. It is not necessary to decide it in this case, but I have the greatest doubt whether a husband can bring an action for the recovery of land against his wife, alleging that she is wrongly in occupation of it, because, if she is wrongly in occupation of the land and he has a right to the possession of it, it seems to me she is a trespasser and therefore he is suing her for a tort. He is not, however, left without remedy, as s. 17 of the Married Women's Property Act, 1882, expressly provides the procedure for deciding a question between husband and wife as to the possession of property, and there are provisions under which effect can be given to this section, because under Or. VI., r. 4, sub-r. 1, of the County Court Rules, 1936–1940, there is authorization for making applications to the court by originating application. It seems to me that in these matters Or. VI., r. 4, sub-r. 1, should be followed, rather than that an action should be brought.

Solicitors for husband: *Hart Jackson & Sons, Barrow-in-Furness.*

Solicitors for wife: *Bell, Brodrick & Gray, for Pickavance & Heron, Barrow-in-Furness.*

K. R. A. H.

SWIFT *v.* MACBEAN AND ANOTHER.

1941
Nov. 26, 27;
Dec. 12.

Contract—Frustration—Landlord and tenant—Furnished house—Letting for period of war—Requisition of house and furniture—Liability of tenant for rent.

By an agreement made in August before the outbreak of war in September, 1939, a furnished house was let to the defendants at a weekly rent, the letting to begin as from the date of the outbreak, if it should occur, and to continue until the termination of hostilities. The defendants entered into possession after the outbreak and paid rent. The premises having been requisitioned, the defendants refused to pay rent, pleading that the contract had been frustrated:—

Held, that the doctrine of frustration, admittedly inapplicable to the demise of unfurnished premises for a term of years, was equally inapplicable to the letting of the furnished premises in the circumstances stated, and that the defendants were liable for the rent.

Semble, if the doctrine of frustration were applicable, the contract would be terminated by the requisition.

ACTION tried by Birkett J.

The plaintiff, Cyril Ernest Joseph Swift, claimed from the defendants, Ian Gordon Macbean and Phyllis Macbean, his wife, the sum of 40*l.* 19*s.*, being three months' rent alleged to be due on May 16, June 16, and July 16, 1941, in respect of premises known as 12 Quay Street, St. Ives, Cornwall, under an agreement in writing made on August 30, 1939. The defendants denied that they were under any liability to pay to the plaintiff the sum claimed or any sum and they pleaded that the agreement of August 30, 1939, was no longer binding on them by reason of the fact that the town clerk of St. Ives, acting as agent for the competent authority, the Ministry of Health, had requisitioned the property the subject of the agreement on March 7, 1941, under the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Act, 1939.

The main terms of the agreement of August 30, 1939, were that, in consideration of the payment of 5*l.* by the defendants to the plaintiff, the plaintiff should let and the defendants should take the said dwelling house together with the furniture, fixtures and effects therein in the event of war being declared by great Britain against any Power or State during the period of one year from the date of the agreement for a period beginning on the date of such declaration of war (but not before September 16, 1939) and ending on the date on which hostilities ceased, at the rent of three guineas a week payable in advance. The defendants covenanted to preserve the furniture, not to remove any of it and to leave it in the rooms where it stood at the beginning of the tenancy when the tenancy came to an end. The plaintiff covenanted to pay all rates, taxes, assessments and outgoings except charges for gas or electric light or telephone, and to keep the building demised in repair during the tenancy, and for quiet enjoyment.

War broke out between Great Britain and Germany, and the defendants entered into possession of the premises under the agreement. After some time they found the premises unsuitable for their needs and they obtained other accommodation in St. Ives, and with the plaintiff's consent they sub-let the premises to other tenants up to March 15, 1941, but on March 7, 1941, the premises were in fact vacant. On that date the town clerk of St. Ives served a requisition notice on the plaintiff as the owner of the premises in exercise of the power conferred on him by reg. 51 of the Defence (General) Regulations, 1939, stating that he had on that date taken possession of the premises. On the same day the town clerk also served a requisition notice on the plaintiff as the owner of the goods and chattels on the premises in exercise of the power given by reg. 53 of the Defence (General) Regulations, 1939, stating that he had on that date taken possession of the furniture, goods and chattels and things owned by the plaintiff then on the premises. The defendants then said that they could not pay rent for property which they were not allowed to occupy. The plaintiff, through his solicitors, while disclaiming any desire to act harshly, maintained that the obligations under the agreement remained in full force and that a claim for compensation was the remedy of the defendants. The latter, though liable under the agreement to pay 163*l*. 16*s*. a year in respect of the premises, were informed that 25*l.* a year was the maximum compensation payable to them. The plaintiff also claimed compensation in respect of the furniture.

W. A. L. Raeburn for the plaintiff.

Valentine Holmes for the defendants. The doctrine of frustration applies to this case, and the defendants are not liable for the rent claimed. It is conceded that the doctrine does not apply to the demise of unfurnished premises for a term of years: *Whitehall Court, Ld.* v. *Ettlinger* (1), but this was not such a demise. In the first place the letting had no certain beginning, for at the date of the agreement it was uncertain whether war would break out, or, if it did, when it would do so. Similarly, there was no fixed time for the duration of the letting, or its termination, for on August 30, 1939, it was then impossible, and it still is, to say when that will be. [*Great Northern Ry. Co.* v. *Arnold* (2) was referred to.] Therefore, this was not a demise of unfurnished premises for a term of years, and the doctrine of frustration could in a proper case apply. In fact, this is such a case. Moreover, the agreement must be regarded as divisible, part of it being possibly a demise of the premises and the other part being a contract for the possession of the furniture. The latter contract has been frustrated, and, therefore, the whole agreement is at an end. It is possible, though improbable, that the premises may cease to be requisitioned before the end of the war, but in that case the performance of the contract will have been interrupted for so long that it would be unreasonable for the defendants to be required to go on with it: per Lord Wright in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (3). The fact that the premises were unoccupied on March 7, 1941, does not affect the question. [Halsbury's Laws of England, 2nd ed., vol. vii., p. 215, was also referred to.]

W. A. L. Raeburn in reply. The doctrine of frustration does not apply. There is no distinction for this purpose

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(1) [1920] 1 K. B. 680.
(2) (1916) 33 Times L. R. 114.
(3) [1942] A. C. 154, 183.

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between the letting of furnished and unfurnished premises. The only distinction between the two lettings is that in the case of a furnished letting there is an implied covenant that the premises are fit for habitation at the time of the letting: *Sarson* v. *Roberts* (1). The agreement of August 30, 1939, is not divisible. In the case of furnished premises the rent issues out of the land just as in the case of unfurnished premises: *Newman* v. *Anderton* (2), *Emott* v. *Cole* (3), Woodfall's Landlord and Tenant, 24th ed., p. 334. The furniture was let merely as an incident of the tenancy. The tenant could not take it away and sub-let the premises unfurnished. It was not separately let and stands or falls with the tenancy [*Williams* v. *Hayward* (4) was also referred to.]

As to the uncertainty of the letting becoming effective and of its duration, the defendants attorned tenants to the plaintiff and paid rent and it is not open to them to deny the tenancy. In *Great Northern Ry. Co.* v. *Arnold* (5), a case of a letting "for "the period of the war," it was held that, as the obvious intention of the parties could have been carried out by the creation of a long lease terminable at the end of the war, effect ought to be given to that intention. It was the conduct of the defendants themselves in leaving the premises vacant that occasioned their requisition. The whole substratum of the contract has not gone, for the premises may cease to be requisitioned. *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Co., Ld.* (6) shows that frustration implies a term of the contract that in the events which happened the contract should come to an end. No such term can be implied here.

Cur. adv. vult.

1941. Dec. 12. BIRKETT J. read a judgment in which he stated the facts, and continued: The Compensation (Defence) Act, 1939, was passed on September 1, 1939. This Act, which provides for compensation to be paid in cases of

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(1) [1895] 2 Q. B. 395.
(2) (1806) 2 B. & P. (N. R.) 224.
(3) (1591) Cro. Eliz. 255.
(4) (1859) 1 E. & E. 1040.
(5) 33 Times L. R. 114.
(6) [1942] A. C. 154.

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requisitioning, was clearly passed, so far as lessees were concerned, on the view that in English law the fact that a lessee had been deprived of the possession of the premises is no excuse for non-payment of rent in the absence of express exception, and the contractual position between the landlord and tenant is in the main unaffected. In Scotland it would appear from *Tay Salmon Fisheries Co., Ld.* v. *Speedie* (1) that the law is different. The compensation for land payable to a tenant where a requisition has taken place is set out in s. 2, sub-s. 1 (*a*), of the Act, and it will be observed that the hypothetical tenant undertakes to do all repairs, external and internal. The defendants in the present case had not undertaken to do external repairs. The compensation in respect of the requisitioning of goods other than vessels, vehicles and aircraft is set out in s. 6, sub-s. 1, of the Act. Sect. 7 provides for the settlement of disputes as to compensation by appropriate tribunals.

Both the learned counsel emphasize the hardship which would fall on their clients whatever my decision should be. In time of war hardships are inevitable and I am the last person, I trust, to be unmindful of them, but this alleviation of hardship is the concern of Parliament and I am glad to think that in this matter it is an active concern. My duty is to decide the present case on what I conceive to be the existing law applicable thereto. But the result of the happenings in this case would appear to be that in consequence of the orders of requisition referred to, the landlord can no longer give the tenants the use of the house and furniture, at least for the time being, either for themselves or for any sub-tenants. The tenants have been deprived of the use of the house and furniture, and the question of compensation is still being negotiated on the footing of requisition and not acquisition, though on terms which to the defendants seem quite inadequate to the position in which they find themselves.

In those circumstances Mr. Valentine Holmes for the defendants submitted that the agreement of August 30, 1939, was at an end, because in all the circumstances the doctrine of frustration applied to it. The facts, he contended, showed that the whole purpose of the agreement had been frustrated and the agreement was, therefore, at an end and the defendants were not liable for any rent after March 7, 1941, although in fact rent due on March 16 and April 16 had been paid after judgment by default had been obtained by the plaintiff. There was no obstacle in law, he argued, to the application of the doctrine of frustration to a tenancy agreement of this nature, which was not to be regarded as an agreement creating an estate by demise at all, and *London and Northern Estates Co.* v. *Schlesinger* (1) and *Whitehall Court, Ld.* v. *Ettlinger* (2) had no application. Mr. Holmes also referred to *Krell* v. *Henry* (3) and *Taylor* v. *Caldwell* (4).

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(1) 1929 S. C. 593.

The language of the agreement of August 30, 1939, is the ordinary language of an agreement made between landlord and tenant for the letting of premises. The relevant words of cl. 1 of the agreement are: "The landlord shall let and "the tenants shall take jointly and severally all that messuage "or dwelling house situated and being No. 12 Quay Street "in the parish of St. Ives in the county of Cornwall together "with the furniture fixtures and effects therein at the rent of "3*l*. 3*s*. for every week of the said term." It was submitted by Mr. Holmes that this agreement is somehow to be regarded as divisible, and, although there may be a demise of the house, there is no demise of the furniture but a contract in respect of the furniture which has been frustrated, and, therefore, the whole agreement is at an end. It was not contested by Mr. Holmes that in the case of a demise of unfurnished premises for a term of years the doctrine of frustration had no application, and the lessee was liable for the rent of the premises. He sought to differentiate the present case on three grounds: (1.) that the agreement of August 30, 1939, was only to become operative if Great Britain declared war against any Power or State, and the date of its beginning, therefore, was uncertain and contingent; (2.) the subject-matter of the agreement was furnished and not unfurnished premises; (3.) the period of time for which the agreement was to run when it had once begun was uncertain, being until the cessation of hostilities, and the agreement was not, therefore, in the same class as an agreement for a term of years. Mr. Raeburn for the plaintiff submitted that the doctrine of frustration had no application to an agreement of this kind which created an estate by demise. There was no fundamental difference between the letting of unfurnished and furnished premises save the implied covenant that the furnished premises were fit for human habitation at the time of the letting. The rent, notwithstanding that the property demised includes chattels, issues out of the land only, and an injury to the chattel interest should not defeat the demise even to the extent of making the rent apportionable. The fact that the agreement was dependent on a contingency for its duration made no difference, for the agreement had in fact come into operation, nor was the fact that the agreement was for the duration of the war material to defeat the agreement. He further submitted that there was no frustration in fact. The whole basis of the agreement had not gone. The premises might be de-requisitioned. Requisition of furniture does not amount to acquisition and even if it did, the plaintiff had not agreed to provide specific furniture and could fulfil his agreement with other furniture. He finally submitted that the present case was governed by the decision in *London and Northern Estates Co.* v. *Schlesinger* (1), *Whitehall Court, Ld.* v. *Ettlinger* (2), and *Matthey* v. *Curling* (3).

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(1) [1916] 1 K. B. 20.
(2) [1920] 1 K. B. 680.
(3) [1903] 2 K. B. 740.
(4) (1863) 3 B. & S. 826.

The first important question, therefore, is whether as a matter of law the doctrine of frustration can apply to the agreement of August 30, 1939. In *London and Northern Estates Co.* v. *Schlesinger* (1), it was held that the defendant was liable for the rent of a residential flat. On war breaking out he became an alien enemy and was prohibited from residing in certain specified areas, which included the place where the flat was. In giving judgment Lush J. said (4): "But there "is, I think, a further answer to the contention. It is not

(1) [1916] 1 K. B. 20.
(2) [1920] 1 K. B. 680.
(3) [1922] 2 A. C. 180.
(4) [1916] 1 K. B. 24.

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"correct to speak of this tenancy agreement as a contract "and nothing more. A term of years was created by it and "vested in the appellant, and I can see no reason for saying "that because this Order disqualified him from personally "residing in the flat it affected the chattel interest which was "vested in him by virtue of the agreement." The question came up for further consideration in *Whitehall Court, Ld.* v. *Ettlinger* (1), where the argument was submitted by Mr. Giveen that there had been frustration. Lord Reading C.J., giving judgment, said (2): "The second point taken by Mr. Giveen was that "there had been a determination of the whole tenancy by reason "of the requisition of the flats. It seems to me that that depends "upon much the same considerations. It is said that, looking "at all the circumstances, treating the case as one would an "ordinary contract, and applying the general principles which "are not in dispute, I ought to hold the whole tenancy to be "at an end. But I find the same difficulty with regard to "this point as I did with regard to the first point." He then quoted the judgment of Lush J., which I have read (3), and continued: "I think that dictum applies to the present case. "I can see no reason why the chattel interest which was vested "in the tenant by virtue of the two leases was affected merely "because he was personally prevented from residing in the "flats. If I were dealing with an ordinary contract I should "feel great force in the argument addressed to me by Mr. Giveen, "but I can find no authority and no justification for saying "that I must apply to the present case the principles laid down "in the citations made by Mr. Giveen. The agreements "contained in the leases are not only contracts, they also create "an estate by demise for a term of years." The House of Lords, in *Matthey* v. *Curling* (4), expressly approved *Whitehall Court, Ld.* v. *Ettlinger* (1).

Therefore, with regard to the first ground on which Mr. Holmes relied, I do not think that the fact that the agreement was only to come into being in the event of war being declared by Great Britain can affect the question which I have to decide. The agreement did come into being, the defendants did enter into possession as tenants of the plaintiff and paid the rent reserved by the agreement. On March 7, 1941, the agreement was in full operation and had been since September 16, 1939. On that ground, therefore, in my judgment, the defendants fail.

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(1) [1920] 1 K. B. 686.

(2) Ibid. 686.

(3) [1916] 1 K. B. 24.

(4) [1922] 2 A. C. 180.

With regard to the second ground, I am asked to say that the law applicable to a demise of unfurnished premises is not applicable to this agreement because of the words "together "with the furniture fixtures and effects therein" and the consequences which follow. The premises being furnished and the landlord being the owner of the furniture is said to make a vital difference. I am unable to accept this contention. No doubt, in the letting of furnished premises there is an implied term that the premises are fit for human habitation at the date of the letting, as in *Sarson* v. *Roberts* (1), but, apart from that matter, I am unable to draw the distinction between furnished and unfurnished premises for which Mr. Holmes contends. In principle I am unable to see that any distinction arises. In *Newman* v. *Anderton* (2) it was held that the landlord could distrain for rent of ready-furnished lodgings. Sir James Mansfield C.J., said (3): "But it must occur "constantly that the value of demised premises is increased "by the goods upon the premises, and yet the rent reserved "still continues to issue out of the house or land, and not out "of the goods." Where lands and goods are let at an entire rent and the tenant is evicted from the lands no apportionment can be made for the goods as the rent is held to issue from the land also: see *Emott* v. *Cole* (4) and *Williams* v. *Hayward* (5). I am not able, therefore, to take the view that the furniture should be regarded as something to be divorced from the general agreement of August 30, 1939, and, in the absence of any authority directing me to do so, I shall hold that the furnished premises are not outside the decisions to which I have referred merely because they are furnished premises.

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(1) [1895] 2 Q. B. 395.
(2) 2 B. & P. (N. R.) 224.
(3) Ibid. 227.
(4) Cro. Eliz. 255.
(5) 1 E. & E. 1040.

There remains the third ground relied on by Mr. Holmes, that this agreement is for a period of time ending with the cessation of hostilities and, therefore, necessarily indeterminate and uncertain. On that ground he submitted that the rule of law applicable to a demise for a term of years has no application to this agreement. The only authority which was cited on this point was *Great Northern Railway Co.* v. *Arnold* (1). The headnote reads: "The plaintiffs in March, 1916, informed "the defendant that they would let certain premises to him "'for the period of the war, the rent payable weekly,' and they "said that they did not intend that he should be subject to a "week's notice. The defendant agreed to these terms and "the parties entered into a formal agreement by which the "plaintiffs let the premises to the defendant 'for the period "'of the war at a weekly rent of 3*l.* 5*s.*, payable weekly.' "In an action by the plaintiffs to recover possession on the "footing that the agreement was void for uncertainty as a "lease for years and only created a weekly tenancy or a tenancy "at will, Held, that even if a lease for years must be for a "period of time which was certain or which could be rendered "certain, yet as the intention of the parties was that the "tenancy should be for the period of the war and as this "intention could have been carried out by a lease extending "over a long period but terminable at the end of the war, "effect must be given to that intention and the plaintiffs "could not recover." I am not sure that this decision is directly in point, but the agreement in that case was held not to be void for uncertainty and did not create a mere weekly tenancy or a tenancy at will. I find myself unable to hold that because this agreement is expressed to be for the period of time ending with the cessation of hostilities it is, therefore, outside the decision in *London and Northern Estates Co.* v. *Schlesinger* (2) and *Whitehall Court, Ld.* v. *Ettlinger* (3). I think, therefore, that in law the doctrine of frustration has no application to this agreement, and whatever I might have wished to do in the circumstances, I am compelled to hold that the defendants' liabilities under the agreement are unaffected by the orders of requisition of March 7, 1941, and the plaintiff is entitled in law to recover the rent sued for in this action.

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(1) 33 Times L. R. 114.
(2) [1916] 1 K. B. 20.
(3) [1920] 1 K. B. 680.

In view of the conclusion to which I have come, it is not necessary to deal at any great length with the doctrine of frustration and its application to the facts of the present case, but out of respect to the arguments of counsel, to both of whom I am greatly indebted, I will shortly state my conclusions on that part of the case in the event of my being wrong on the other.

The doctrine of frustration has recently received full consideration in the House of Lords in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (1), although the main matter for consideration there was concerned with a question of onus of proof. In that case Lord Wright pointed out (2) that the fuller and more accurate phrase is "frustration "of the adventure or of the commercial or practical purpose "of the contract," and Viscount Maugham pointed out (3) that the doctrine had been considered in more than fifty reported cases, the references to which are collected in vol. vii. of Halsbury's Laws of England, 2nd ed., p. 215, some of which Mr. Holmes cited. In the form in which we know it, the doctrine appears to have originated in the words of Blackburn J. when delivering the judgment of the Queen's Bench in *Taylor* v. *Caldwell* (4). He said: "The principle seems to "us to be that, in contracts in which the performance depends "on the continued existence of a given person or thing, a "condition is implied that the impossibility of performance "arising from the perishing of the person or thing shall excuse "the performance." In the recent *Joseph Constantine* case (1) Lord Wright, after giving the fuller and more accurate phrase which I have quoted, went on to say (2): "This change in "language corresponds to a wider conception of impossibility, "which has extended the rule, beyond contracts which depend "on the existence, at the relevant time, of a specific object,

(1) [1942] A. C. 154.
(2) Ibid. 182.
(3) Ibid. 169.
(4) 3 B. & S. 839.

"as in the instances given by Blackburn J., to cases where "the essential object does indeed exist, but its condition has "by some casualty been so changed as to be not available "for purposes of the contract either at the contract date, "or if no date is fixed, within any time consistent with the "commercial or practical adventure. For the purposes of "the contract the object is as good as lost. Another case, "often described as frustration, is where by State interference "or similar overriding intervention the performance of the "contract has been interrupted for so long a time as to make "it unreasonable for the parties to be required to go on with "it. Yet another illustration is where the actual object still "exists and is available, but the object of the contract as "contemplated by both parties was its employment for a "particular purpose, which has become impossible, as in the "Coronation cases. In these and similar cases, where there "is not in the strict sense impossibility by some casual happening, there has been so vital a change in the circumstances "as to defeat the contract." In the present case, although Mr. Raeburn said that the premises might one day cease to be requisitioned, and it is, of course, impossible to say that the requisitioning will in fact be co-terminous with the duration of the war, nevertheless, now, in December, 1941, the requisition of March 7, 1941, is still in force and the words of Lord Wright would seem to apply (1): "by State interference . . . . the "performance of the contract has been interrupted for so long "a time as to make it unreasonable for the parties to be "required to go on with it." There are further passages in the speech of Lord Wright to which reference could be made, but I will content myself by citing two (2). "The doctrine "of frustration is intended to achieve a just and reasonable "result." Then, later on: "But the results of holding a man "to the absolute terms of a contract would often be so unjust, "that from early times, as the examples of Blackburn J., in "*Taylor* v. *Caldwell* (3) show, the courts set themselves to avoid "these results wherever justice seemed to require it. The

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(1) [1942] A. C. 154.
(2) Ibid. 183.
(3) 3 B. & S. 826.

"doctrine of frustration thus, in Lord Sumner's words (*Hirji* "*Mulji* v. *Cheong Yue Steamship Co., Ld.* (1)), is 'a device by "'which the rules as to absolute contracts are reconciled "'with a special exception which justice demands.'"

One of the submissions made by Mr. Raeburn was that the parties to the present agreement, from the wording of the agreement itself, realized that the premises might be requisitioned. I can find no support for this in the wording of the agreement and I think, in the words of Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (2), "they had neither thought nor "intention regarding it."

The only other case to which I would make reference is *White & Carter, Ld.* v. *Carbis Bay Garage, Ld.* (3). That is the case of a contract dealing with the right to display advertisements where the local authority, acting under the Defence Regulations, had required the obliteration of all place names. MacKinnon L.J. uses these words (4): "The question could "be tested in this way. If, when the parties were making "the agreement, a third party had said: 'Supposing there is "'a war in which this country is involved, and as a result "'of that the government or the local authority insisted upon "'painting out all local names in advertisements wherever "'displayed with the result that your advertisement of the "'Carbis Bay Garage at St. Ives becomes futile and ridiculous "'with the words 'Carbis Bay' and 'St. Ives' painted out, "'what is to happen?' Both sides would have said: 'Of "'course, in that case, the contract is at an end. The con- "'tractors can no longer display the advertisement and the "'advertisers can no longer be required to pay for it.'"

If the present is a contract to which the doctrine of frustration applies at all, I am of opinion that the contract has been frustrated and is thereby at an end. There has been, in the words of Lord Wright in the *Joseph Constantine* case (5), "so vital a change in the circumstances as to defeat the "contract," and, applying the test of MacKinnon L.J. in *White*

(1) [1926] A. C. 497, 510.
(2) (1881) 6 App. Cas. 38, 59.
(3) [1941] 2 All E. R. 633.
(4) [1941] 2 All E. R. 635.
(5) [1942] A. C. 154.

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and Carter, Ld. v. *Carbis Bay Garage, Ld.* (1), if, at the time of the making of the agreement, a third party had said: "Supposing the war we contemplate actually comes about "and as a result of that the government or the local authority "take over this furnished house so that you can no longer live "in it or allow any sub-tenant to live in it and the landlord "cannot give you possession, what is to happen?" both sides would have said then: "In that event of course the "contract is at an end. You cannot be expected to go on "paying rent for the premises when the State has taken them "from you for its own purposes and as all your benefits are "gone and the whole purpose of the contract has been "defeated."

The *Joseph Constantine* case (2) would seem to show that the onus of proof does not lie on the defendants to establish that the circumstances causing the frustration were not brought about by their default or neglect. The onus of showing that they were is on the plaintiff, but, if the evidence raises a presumption of the defendants' default, the onus is on the defendants to destroy that presumption until the evidence is equally consistent with either view. I am not satisfied on the evidence that it was because the premises were empty that the requisitioning order was served, and I am certainly not satisfied that there was any default or neglect on the part of the defendants which disentitled them to rely on the doctrine of frustration or that the evidence raises any presumption that they were in default.

If, therefore, this is a contract to which the doctrine applies, I find that the contract was frustrated and consequently ended on March 7, 1941, and the claim for rent for May, June and July, 1941, therefore, fails. But, holding, as I do, that the doctrine of frustration has no application, and for the reasons I have stated, I give judgment for the plaintiff for 40*l.* 19*s.* with costs.

Solicitors for plaintiff: *Spiro & Steele.*
Solicitors for defendants: *Chamberlain & Co.*

W. L. B.

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(1) [1941] 2 All E. R. 633, 635.

(2) [1942] A. C. 154.

LORD HOWARD DE WALDEN *v.* INLAND REVENUE COMMISSIONERS.

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Nov. 25, 26; *Dec.* 16.

Revenue—Income tax—Avoidance of taxation—Transfer of assets to company abroad—Assets transferred sole assets of foreign company—Transferor liable to be assessed in respect of whole income of company—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), s. 18.

As the result of a series of transactions extending over a number of years valuable assets belonging to the appellant and consisting of shares in and debts owing to an English company became vested in four Canadian companies, the whole of the assets of the Canadian companies being traceable to this source. The appellant did not dispute that the transactions were of the kind described in the preamble to s. 18 of the Finance Act, 1936, namely, to avoid income tax by the transfer of income to persons abroad, and he admitted that their sole purpose was to avoid liability to taxation. The only interests which, during the relevant periods, were held by the appellant in respect of the consideration payable under these transactions, consisted of (1.) an interest in certain notes issued to him by the Canadian companies; (2.) part of certain sums of cash on deposit with the Canadian companies and repayable on demand, the remainder being sums actually deposited by him; (3.) a small number of shares in two of the companies; and (4.) certain annuities payable to himself or his wife by one or other of the companies. The remainder of the consideration or what represented it he had effectively put out of his control. The appellant admitted that the whole of the income of the Canadian companies would be chargeable to income tax if it were his income received by him in the United Kingdom. The annuities and the interest element in each payment of the notes had borne tax in the usual way. The assessments against which he appealed were based on the view that the whole of the income of the Canadian companies was, under s. 18 of the Finance Act of 1936, to be deemed to be the income of the appellant for all the purposes of the Income Tax Acts:—

Held, affirming Macnaghten J., that the appellant had "power "to enjoy" the whole income of the Canadian companies within the meaning of s. 18 of the Finance Act, 1936, and that, therefore, he was liable to be assessed to income tax and sur-tax in respect thereof.

APPEAL from Macnaghten J.

The appellant appealed to the Special Commissioners of Income Tax against assessments to sur-tax (*a*) in the sum of 351,044*l*. for the year ended April 5, 1936, and (*b*) in the sum of 350,000*l.* for the year ended April 5, 1937. He also appealed against an assessment to income tax in the sum of 150,000*l.* for the year ended April 5, 1937. The appellant was ordinarily resident in the United Kingdom. In December, 1918, an English private company was registered to acquire part of an estate in London belonging to the appellant. The capital of the private company was 3,500,000*l.*, divided into 3,000,000 ordinary and 500,000 preference shares of 1*l.* each. In 1919 and 1920 the appellant sold the estate to the company for 2,120,000 shares and 885,544*l.* cash. In August, 1922, the private company was converted into a public company with the same capital. In September, 1922, the appellant sold his life interest in other property in London to the company for 590,000 shares and 152,277*l.* cash. Later, he transferred 2,510,100 shares in the company, a debt of 760,897*l.* 10*s.* owing to him by the company, 450,000 shares in a company incorporated in Kenya, parts of his estates in Scotland, a further part of his estate in London and other assets to various Canadian companies in Canada. These were the sole assets of the Canadian companies. As a result of these transfers the appellant was entitled to receive shares in the Canadian companies, an annuity of 20,000*l.* until December 31, 1936, and thereafter a life annuity of 50,000*l.*, 320,000*l.* payable in instalments, a guarantee to pay a life annuity of 15,000*l.* to his wife as from the date of his death, and a bequest not exceeding 250,000*l.* to his children, if such bequest should be contained in his will. A life annuity of 5000*l.* was also payable to the appellant's wife as from the date of his death. In April, 1923, the appellant sold 5000 shares in one of the Canadian companies to another of the Canadian companies for $1,000,000. In May, 1923, the appellant by deed of gift, transferred to a Canadian trustee company 25,000 shares in one of the Canadian companies to be held by the trustee company as trustees for his son, the income thereof to be accumulated until his son attained the age of twenty-one years. The appellant was also to be paid a further life annuity of 10,000*l.* by one of the Canadian companies. In May, 1924, he sold 160,000 shares in the English company and 7000 shares

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in one of the Canadian companies to another Canadian company for 125,000*l.* cash, payable by yearly instalments of 5000*l.* and $765,000 in cash, to be applied in paying a balance unpaid in respect of shares in that company held by the appellant, and, as a further consideration, a life annuity of 10,000*l.* In September, 1927, the appellant transferred 2500 shares in one of the Canadian companies to the English company in return for the English company undertaking to pay bequests in his will up to 250,000*l.* for the benefit of his children. In 1927 and 1930 he sold the annuity of 20,000*l.* payable to him by one of the Canadian companies to another of the Canadian companies for 160,000*l.* payable over two periods of five years each. In December, 1933, the appellant surrendered the life annuity of 50,000*l.* to one of the Canadian companies and paid to it the sum of 182,388*l.*, the consideration being 1,170,000*l.*, payable quarterly by one hundred and twenty promissory notes of 9750*l.* each to be issued by the Canadian company to him. In the same month the appellant's son by deed gave five of his 25,000 shares to be held for the benefit of the appellant. The liability undertaken by one of the Canadian companies in May, 1924, to pay the appellant a life annuity of 10,000*l.* was released by him, and he paid it 196,865*l.*, and in consideration therefor the Canadian company agreed to pay him 300,000*l.* by one hundred and twenty notes of 2500*l.* each, payable quarterly. The appellant also released the Canadian company from all liability to pay him the 320,000*l.* by instalments, and paid it 192,223*l.* in return for its paying him 750,000*l.* by one hundred and twenty notes of 6250*l.* each, payable quarterly. By these and other transactions the appellant transferred all his shares in each of the Canadian companies, except the five shares given to him by his son, to other of the Canadian companies for one hundred and twenty notes, payable quarterly over a period of thirty years. As a result of these operations, in 1933, the appellant was entitled to be paid 89,000*l.* a year over a period of thirty years. In December, 1933, the appellant transferred all the notes to a Canadian investment company as trustees to collect and pay the net proceeds to him for life and after his death to his son.

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The appellant also had 278,214*l.* on deposit with four of the Canadian companies. These deposits were repayable on demand.

The Special Commissioners confirmed the assessments on the ground that, under s. 18 of the Finance Act, 1936, the appellant had power to enjoy the whole of the income of the Canadian companies, and Macnaghten J. upheld their finding. The appellant appealed. It was admitted that s. 18 of the Finance Act, 1936, applied, and the questions for decision were: (1.) whether the amount of the tax leviable was ascertained by reference to the extent of the interest of the appellant in the income of the Canadian companies coming within the section; and (2.) what that interest was.

J. Millard Tucker K.C. and *Scrimgeour* for the appellant. The amount taxable under s. 18 is that part of the income of the Canadian companies which the appellant has "power to "enjoy." Macnaghten J., in reliance on sub-s. 3 of s. 18, wrongly held that the appellant must be "deemed to have power "to enjoy" the whole of the income of the companies. Subsect. 3, however, does not fix the quantum to be taxed, but only provides the tests for ascertaining what income the taxpayer in this country is "deemed to have power to enjoy." The appellant's interest is restricted to promissory notes, money on deposit, and certain shares in two of the companies. He also enjoys annuities, but tax on these has been assessed and paid. The promissory notes were given for valuable consideration, and, therefore, the produce of these notes does not come within sub-s. 3 (*c*) as amounting to the receipt of a "benefit." The same is true of the receipts from deposits made by the appellant, and, therefore, the only benefit of the appellant in Canada is certain shares in the Canadian companies. He cannot, because of that restricted interest, be taxed on the whole income of the Canadian companies. Only so much of the income as the appellant has "power to enjoy" or is deemed to have "power to enjoy" is taxable under s. 18, sub-ss. 1, 3. That view is supported by the preamble and a preamble may be legitimately consulted to solve any ambiguity: Maxwell on the Interpretation of Statutes, 8th ed., p. 40. Moreover "all charges on the subject must be imposed by clear and "unambiguous language": ibid p. 250. It is to be noted that in s. 18, sub-s. 3, the language is: "An individual shall, "for the purposes of this section, be deemed to have power "to enjoy income of a person resident or domiciled out of the "United Kingdom . . . ."—not "any income," but "income." The view that the individual would be taxable on the whole income leads to an absurdity as, for example, where a man acquires a small annuity in a foreign insurance company to avoid tax. The limitation contended for has been expressly imposed in somewhat different circumstances in the amendment to s. 18 contained in s. 28, sub-s. 2, of the Finance Act, 1938. Although there is no such express limitation in s. 18, sub-s. 1, it is a charging section, leaving it to be ascertained what the person charged has "power to enjoy." In so far as *Admiral Lord Beatty's Executors* v. *Inland Revenue Commissioners* (1) decides otherwise, it is wrong. The whole object of the section is to impose on people the burden of taxation which they were trying to avoid, and no more. In support of that view it is to be noted that the section is retrospective. Only so much of the income received out of the United Kingdom as remains after giving effect to all other rights should be taxed. The bulk of the Canadian income goes to the appellant's son and is taxable in his hands. If the appellant is also taxed in respect of the son's income there is double taxation.

Sir William Jowitt S.-G., J. H. Stamp and *R. P. Hills* for the respondents. The preamble to s. 18 of the Act of 1936 is directed to the future. The appellant received a benefit by means of notes provided out of income. Sect. 28 of the Act of 1938 does away with the test of "power to enjoy" inserted in s. 18 of the Act of 1936.

Tucker K.C. in reply. If there is a doubt as to a subject being liable to a tax the benefit of the doubt should be given to the subject.

Cur. adv. vult.

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(1) (1940) 23 Tax Cas. 574.

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HOWARD DE WALDEN v. INLAND REVENUE COMMISSIONERS.

1941. Dec. 16. LORD GREENE M.R. read the following judgment of the court (LORD GREENE M.R., CLAUSON and DU PARCQ L.JJ.). This is another appeal by a taxpayer against an assessment made under s. 18 of the Finance Act, 1936. We need not repeat what we have said in our judgment in *Latilla* v. *Inland Revenue Commissioners* (1) with regard to the purpose of the section, and no useful purpose will be served by a full quotation of those of its elaborate provisions which are relevant to the present controversy.

Apart from the extended meaning given to the words "power to enjoy" by sub-s. 1 of s. 18, the only income of the Canadian companies which Lord Howard de Walden has power to enjoy can consist at the most of a very small part of the actual income of the companies. The question, therefore, and the only question which arises is whether the assessment should be based on that part only or (as has been held below) on the whole income of the four companies. We have come without any hesitation to the conclusion that the latter is the true view.

The income of a person resident or domiciled out of the United Kingdom which under s. 18, sub-s. 1, is deemed to be income of the taxpayer is described as "that income," a phrase which refers back to the income mentioned in the earlier part of the sub-section in the following phrase: "Where . . . . an "individual has . . . . power to enjoy . . . . any income of a "person resident or domiciled out of the United Kingdom. . . ." "Power to enjoy income" includes the cases mentioned in sub-s. 3 and, in particular, the cases where "(*b*) the receipt or "accrual of the income operates to increase the value to the "individual of any assets held by him or for his benefit," and "(*c*) the individual receives or is entitled to receive, at any time, "any benefit provided or to be provided out of that income or "out of moneys which are or will be available for the purpose "by reason of the effect or successive effects of the associated "operations on that income and on any assets which directly "or indirectly represent that income." In the present case it appears to us clear beyond the possibility of doubt that both

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(1) Ante, p. 299.

(*b*) and (*c*) apply. The receipt of the income by each company operates to increase the value of the notes and of the deposit debt which are clearly "assets" held by Lord Howard de Walden or for his benefit, the notes in fact being held by trustees. Similarly, the payments made and to be made in respect of the notes and deposits are "benefits" within the meaning of (*c*) since "benefit" as defined by sub-s. 5 includes a payment of any kind.

An examination of the language of sub-s. 3 in conjunction with sub-s. 1 into which, being a definition clause, it must be read, makes it clear that the power to enjoy income with which sub-s. 1 is dealing need not by any means necessarily extend to the whole of the income of the non-resident person. Thus, the benefit which is derived by the taxpayer from the increase in value of assets held by him may be very small compared either with the total income of the company or with so much of that income as is derived from the assets transferred. We are unable, therefore, to accept the argument that the income which is caught by sub-s. 1 is limited to the income which the taxpayer is, in fact, entitled or able to receive.

Mr. Tucker argued that sub-s. 3 does not deal with the quantum, but only with the character of the income which the taxpayer is to be deemed to have power to enjoy, but the real question depends on the meaning of the words "any "income" in sub-s. 1, words which, in our opinion, are, in the context of the sub-section when read together with sub-s. 3, incapable of being construed as limited to income which the taxpayer is entitled or able to enjoy in fact.

Our conclusion on this matter can be tested by writing (for example) the provisions of sub-s. 3 (*b*) into sub-s. 1, which will then run as follows: "Where such an individual has, by "means of any such transfer . . . . acquired any rights by "virtue of which the receipt or accrual of any income of a "person resident or domiciled out of the United Kingdom "operates to increase the value to the individual of any assets "held by him or for his benefit . . . . that income shall . . . . "be deemed to be the income of that individual . . . ." It seems to us hopeless to suggest that as a matter of language the income which is deemed to be the income of the taxpayer is to be confined to such part of the income as represents the increased value of the assets.

But here a difficulty is raised by Mr. Tucker, the nature of which we can best explain by stating the three possible constructions of the relevant provisions which were discussed before us. At one end of the scale lies Mr. Tucker's argument in the present case. At the other end of the scale lies the argument favoured by counsel on behalf of the Crown that, however small the benefit in fact enjoyed by the transferor of the assets and however large the income of the non-resident person or company, the whole of that income is to be deemed to be income of the transferor even if only part of it is traceable to the assets transferred. An intermediate suggestion favoured by neither side was to the effect that the only income of the non-resident which is to be deemed to be income of the transferor is that part of the income which is traceable to the assets transferred. No doubt, in the majority of cases which in practice come within the scope of the section, the transferee will have been constituted, either individually as a trustee or as a corporation, for the sole purpose of carrying out the transaction and will have no other income, but cases might arise where the transferee selected was, for example, an existing corporation with very large assets and income of its own and the income attributable to the assets transferred might be a very small proportion of its total income. It cannot be supposed, argues Mr. Tucker, that the legislature can have intended to produce such an extreme result as might be produced on the second of the three constructions since it would impose an entirely disproportionate penalty on the taxpayer, and, rejecting the intermediate view which, he said, could not be reconciled with the language used, he arrived by a process of elimination at his own construction as being the only possible one.

We find it impossible to accept Mr. Tucker's argument. If, as it seems to us, the language of the section clearly does not limit the income of the non-resident in respect of which the taxpayer is charged to the actual benefit which he draws

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from the income of the non-resident—a construction, be it observed, which would largely defeat the expressed purpose of the section—it is illegitimate to force on that language a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust. But, even if the only alternative to Mr. Tucker's construction is the second of the three constructions, we are not prepared to say that it is necessarily as unjust as he contends. The section is a penal one, and its consequences, whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. For years a battle of manœuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers. It is not, however, necessary for us to choose between the second and third constructions. We would rather defer that choice until a case which raises the issue can be considered on its own facts. In the present case it is sufficient to say that the appellant is, in our opinion, chargeable in respect of the entire income of the Canadian companies, the whole of which is to be traced to the assets originally transferred to them.

One further point taken by Mr. Tucker may be mentioned. He pointed out that in so far as the right to enjoy income of the four companies is vested in the appellant's son, who holds the majority of the shares, income received by the son will be taxed in his hands in the ordinary way and at the same time the appellant will be liable to tax on the whole income of the companies which is deemed to be his. This, said Mr. Tucker, involves double taxation since no relief is afforded

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by para. 3 of Schedule II. to the Finance Act, 1936. There is a short answer to this argument. There is no double taxation since the subject-matter of tax is different, the income of the son being one thing and the income of the companies being another. But, quite apart from this, the argument based on hardship leaves us unmoved. The son will bear tax in the ordinary way on his own income, and the father will be taxed on the companies' income because he is the person against whom the deterrent action of the section is directed. The fact that the section has to some extent a retroactive effect again appears to us of no importance when it is realized that the legislation is a move in a long and fiercely contested battle with individuals who well understand the rigour of the contest.

There is one further argument advanced by Mr. Tucker which we only mention in order to say that we disagree with it. By s. 28 of the Finance Act, 1938, certain amendments were made in s. 18 of the Finance Act of 1936. In particular the provision was made by the new section to meet devices by which a transferor took care to give himself no "power to "enjoy" any income of a non-resident transferee company within the meaning of s. 18, but obtained the money he required, for example, by borrowing from the company, all the shares being vested, for example, in his children. In this new section the phrase "power to enjoy" did not, and obviously could not, appear, as the best and the natural method of taxing the transferor was by taxing him on the amounts he in fact obtained out of the company's coffers. According to the argument this new section only charges with tax the benefit in fact obtained and shows that the legislature understood s. 18 as imposing the same limitation on the quantum of income charged with tax under that section. Quite apart from the fact that the new section is dealing with a different type of transaction, it is, in our opinion, illegitimate to use subsequent legislation to construe previous legislation in this way, even where the subsequent legislation forms part of the same code. The argument, which in any event is inadmissible, is particularly so in the present case which is dealing with assessments for periods before the amendment came into force.

Questions similar to those raised in the present case were considered by Lawrence J. in three appeals by Admiral Earl Beatty's executors and his two sons (1). Lawrence J. answered these questions against the taxpayers, and the decision is, therefore, an authority against the arguments submitted in the present case by Mr. Tucker who contended that the decisions in the *Beatty* cases (1) were wrong and ought to be overruled. It follows from what we have already said that those decisions were, in our opinion, correct in so far as they deal with the same questions as those raised in the present appeal. We agree with the conclusions of Macnaghten J. and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Charles Wright.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

P. J. B.

(1) 23 Tax Cas. 574.

WERNHER v. INLAND REVENUE COMMISSIONERS.

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Jan. 20, 21, 22.

Revenue—National defence contribution—Husbandry—Stud farm—Fees for services of stallion—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 19, *sub-ss.* 1, 2.

National defence contribution is chargeable, under s. 19, sub-ss. 1 and 2, of the Finance Act, 1937, on the profits of husbandry unless, in any accounting period under the Act, they do not exceed the limit of 2000*l.* laid down by s. 21, sub-s. 1.

The occupier of a stud farm, which was used to breed racehorses for the breeder's own use, let the services of a stallion owned by her at the farm to other owners of mares in consideration of the payment of fees:—

Held, that there was evidence on which Special Commissioners could find that the business of keeping the stallion to serve other owners' mares was separable from the business of using the stallion for serving the owner's own mares to breed racehorses for the breeder's own use as a recreation, and that liability to national defence contribution arose in respect of the fees so received, subject to allowance of expenses.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the commissioners held on September 5, 1940, the appellant, Lady Zia Wernher, appealed against an assessment to national defence contribution made on her for the twelve months ending December 31, 1938, in the estimated sum of 4500*l.* with net amount chargeable 3000*l.* and duty payable 150*l.* The question for the determination of the commissioners was whether liability to national defence contribution arose in respect of fees for letting the services of stallions and fees for the keep of visiting mares.

In 1937 the appellant acquired the property known as Someries Stud, Newmarket, and the land adjoining it. The appellant owned and raced the stallion, Precipitation, which she sent to stud at the end of that year. The property comprised about 120 acres, but of this a considerable amount was made up of divisions between paddocks, roads, etc., the total amount of land available for farming being only about ninety acres. There were seventeen paddocks ranging from four to eighteen acres. They were sheltered by trees and were enclosed by post and rail fences. Electric light and water were laid on to the buildings, which were of brick and wood construction. The total number of stud boxes was fifty-six of which twelve were completely brick built and forty-four were wooden. The stud farm was laid out and run in a similar way to other stud farms at Newmarket. Up to 1939 there was no arable land, but in that year about one-tenth of the total acreage was ploughed up by order of the government. The fodder and forage was all bought, the total purchases amounting in 1938 to 993*l.*, and in 1939 to 1476*l.*, which sums included the cost of the keep of the appellant's mares when they visited other stallions for service. The appellant was assessed under sch. B for 1937/8, 1938/9 and 1939/40 on the full annual value in respect of the whole of the stud farm, an allowance from the assessment being made for part earned income relief. The appellant in consultation with her manager selected from the animals bred those that were good for racing and breeding. The selected animals were then sent to racing stables. Those that after trial on the racecourse looked like making good brood mares or good stallions went back to the stud. The appellant's stallion, in addition to serving mares belonging to the appellant, also served mares from other parts of the country and from abroad at a fee of 300 guineas. Service fees received by the appellant were: in 1938, 5965*l.* and in 1939, 9135*l.* The other owners' mares were served at the appellant's stud farm. These mares in most cases arrived at the farm some time before service and remained there for an average of about four months. The appellant raced on a moderate scale to test the bloodstock on the racecourse. The stallion, Precipitation, was advertised in the Racing Calendar and the sporting newspapers. A separate banking account was kept at Newmarket for the receipts and expenditure of the stud. The accounts were made up to December 31 in each year and were audited by chartered accountants. All racing expenditure and receipts were excluded from the accounts. The bloodstock was valued at the beginning and at the end of the year. The accounts showed a profit of 2552*l.* for 1938, and of 6882*l.* for 1939. The stud boxes, buildings, and land were all derated under the Rating and Valuation (Apportionment) Act, 1928. The manure was used for fertilisation of the stud lands and certain agricultural stock had been maintained. The employees were all insured under the National Health Insurance Act at agricultural rates.

The following general propositions admitted or proved in *Lord Glanely* v. *Wightman* (1) were admitted in evidence as being equally applicable to the present case, as were also the consequences and corresponding particular facts as set out below: (*a*) Success in breeding thoroughbred horses could only be attained by submitting them to the test of the racecourse to find out whether they possessed the necessary speed and stamina. The test was essential to ascertain the value of both stallions and mares for producing high class progeny, and it was only by the successful racing of the progeny of a stallion that the fee for his services could be maintained. In some instances the owner of the stud did not race his horses himself, but the capabilities of the horses bred by him were tested on the racecourse by the purchasers. The method followed by the appellant was the one usually adopted. (*b*) It was not conducive to successful breeding to send a mare every year to the same stallion. In course of time, after the fillies bred at the breeding stud had finished their racing career, they returned to the breeding stud, but it sometimes happened that, owing to close relationship to the stud stallions, they could not be mated with any of them for fear of the ill effects of inbreeding. Consequently, it was sometimes necessary to procure for the appellant's mares the services of a stallion or stallions belonging to other owners, for which fees were paid, or for which the services of stallions of the appellant were given in exchange. In these cases the appellant, in addition to the stallion's fees, paid for the keep of her mares at the stud visited and the necessary travelling expenses. (*c*) Thoroughbred stallions must stand at a properly equipped stud farm, and it was not practicable to send them about the country to serve other owners' mares. The owner of stallions must, therefore, either occupy sufficient land to accommodate the stallions and the visiting mares, or else the stallions must stand at some other similarly equipped breeding establishment. In the case of a stud with twenty or thirty visiting mares, a large number of paddocks was required for the accommodation of the visiting mares and the owner's own mares, and a number of spare paddocks and loose boxes was also needed. It was usual to find a high class stud farm with the paddocks divided by fences, lined by trees, with water laid on and equipped with loose boxes lit with electric light. (*d*) A mature stallion should serve thirty to forty mares each season, and the appellant did not have sufficient mares, especially when regard was had to the evidence set out in (*b*) above, to keep her stallions

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(1) (1931–3) 17 Tax Cas. 634.

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fully employed. She was, therefore, obliged to let their services to the owners of other brood mares. Apart from keeping the stallion in health, the obtaining of nominations from first-class mares was the best way of proving the value of the stallion as the sire of good progeny. (*e*) The appellant did not expect to make a profit out of racing alone, but she hoped that she might make a profit out of the breeding and racing establishment as a whole. She had always run the whole establishment on what she considered to be commercial lines.

It was contended for the appellant (inter alia) that the profits of husbandry assessed to income tax under sch. B. were not within the scope of the charge to national defence contribution.

The commissioners gave their determination as follows: "We held as a general principle that profits from husbandry "(or otherwise from the occupation of land) are within the "charge to national defence contribution if or in so far as "a business is being carried on. Where the occupier of a "stud farm lets out the services of a stallion at the farm for "payment of a fee this special activity, no less than the "general activity of breeding racehorses at the farm for "the occupier's own stables, is essentially connected with "the occupation of the land. When, therefore, the question "to be considered is the profit in respect of the occupation "of land, as distinct from profit from any other source, "the first activity is inseparable from the second, both "falling together for income tax purposes within sch. B.: "*Lord Glanely* v. *Wightman* (1). The question before us, however, "is whether the first activity is separable from the second "as a 'business' and is so separably chargeable to the national "defence contribution. In our view, it may be so separable "and, on the facts of the case before us, is so separable. The "purpose of breeding racehorses for the breeder's own use "is a recreational purpose: cf. Lord Wright in *Lord Glanely* "v. *Wightman* (2); whereas the purpose of letting the services "of a stallion is a commercial or business purpose.

(1) 17 Tax Cas. 634.

(2) Ibid. 674.

"Consequently we hold that liability to national defence "contribution arises in respect of fees for the services of "stallions, together with fees for the keep of the visiting "mares, subject to allowance of the proper expenses." On the figures being agreed, the commissioners reduced the assessment to 2883*l.*, with net amount chargeable 1059*l.*, and duty payable 52*l.* 19*s.*

At the request of the appellant, the commissioners stated a case for the opinion of the High Court.

Bowe for the appellant.

Sir Wm. Jowitt S.-G. and *R. P. Hills* for the Crown.

The arguments are fully stated in the judgment.

LAWRENCE J. Two main points have been raised under the Finance Act, 1937, which imposes liability to national defence contributions. The first point taken on behalf of the appellant is that the business of husbandry is not within the Act of 1937, and that, therefore, national defence contribution cannot be exacted from any business of husbandry. The second point is that the commissioners were wrong in their decision that the business conducted on the stud farm, which it is admitted was a business, can be separated from the breeding operations which the appellant carried on for her own purpose with a view to racing as a recreation.

The first question depends primarily on the construction of ss. 19 and 20 of the Act of 1937. Sub-sect. 1 of s. 19 is in these terms: "There shall be charged, on the profits "arising in each chargeable accounting period falling within "the five years beginning on April 1, 1937, from any trade "or business to which this section applies, a tax (to be called "the 'national defence contribution')" of a certain amount. By sub-s. 2: "Subject as hereafter provided, the trades "and businesses to which the section applies are all trades "or businesses of any description carried on in the United "Kingdom, or carried on, whether personally or through an "agent, by persons ordinarily resident in the United "Kingdom." Sub-sect. 3 excludes from such trades or businesses a profession carried on by an individual or by individuals in partnership, and sub-s. 4 provides that when the functions of a company consist wholly or mainly of the holding of investments it shall be deemed for the purpose of this section to be a business carried on by the company. It is evident that the words used in s. 19, sub-s. 2, are of the widest possible nature and that prima facie they apply to every trade or business. It is conceded, and is clear, I think, that husbandry is, or may be, a business, and in the case with which I have to deal it is largely, at any rate, a business.

It is difficult to see how the sub-section can be read so as to exclude husbandry, but Mr. Bowe, for the appellant, contends that the other sections of the Act indicate that it must have been the intention of the legislature to exclude husbandry from the trades or businesses dealt with by the Act. In the first place, he relies on s. 20, sub-s. 1, which provides: "For the purpose of the national defence "contribution, the profits arising from a trade or business in "each chargeable accounting period shall be separately "computed, and shall be so computed on income tax principles "as adapted in accordance with the provisions of the fourth "schedule to this Act. For the purpose of this sub-section "the expression 'income tax principles' in relation to a "trade or business means the principles on which the profits "arising from the trade or business are computed for the "purpose of income tax under case I. of sch. D, or would be "so computed if income tax were chargeable under that case "in respect of the profits so arising." Mr. Bowe's contention is that those words, "or would be so computed if income tax "were chargeable under that case in respect of the profits "so arising" cannot apply to any of the schedules to the Income Tax Act, 1918, other than D, and must be read as referring only to the cases other than case I. of sch. D, and that, therefore, you must infer a limitation of the general words used in s. 19. He reinforces that argument by reference to s. 25, which provides: "The amount of the national "defence contribution payable in respect of the profits arising "from a trade or business in any chargeable accounting "period shall be allowed to be deducted as an expense in "computing for the purpose of income tax the profits and "gains arising from that trade or business in that period," and he says that that section is totally inapplicable to the case of a business which is chargeable under sch. B because no expenses for the purposes of income tax are allowed to be deducted against the assessment under sch. B. That is perfectly true. He also relies on the provisions of the Fourth Schedule to the Act of 1937, and particularly on para. 2 which empowers persons charged under the Act, if they have sustained losses in the trade or business, to claim that the loss should be carried forward and deducted from the profits arising from the trade in any of the relevant accounting periods. He also relies on para. 3 which empowers persons charged to deduct a sum which represents the diminution in value by reason of wear and tear of any plant or machinery during the period. He points out that in the case of husbandry it is entirely unnecessary for farmers to keep accounts, and if they keep accounts, apart from their right to be taxed under sch. D, they have no right to set off their losses or to carry forward their losses or to get any allowance in respect of wear and tear. Therefore, if they have not kept accounts and have not been taxed under sch. D at their own option, they cannot get the benefit of the provisions of these paragraphs. That also is true. Lastly, Mr. Bowe relied on *Simpson* v. *Grange Trust, Ld.* (1), which was a decision of the House of Lords on the construction of the proviso to s. 33 of the Income Tax Act, 1918. His argument was that, the House of Lords having put the construction which they did put on that proviso, a similar construction ought to be put on the words in s. 20 of the Act of 1937.

The Solicitor-General, on the other hand, relied on the general terms of s. 19, sub-s. 2. He drew my attention to the provisions of s. 39 of the Finance Act (No. 2), 1915, which closely corresponds to the provisions of s. 19, sub-s. 3, and pointed out that where the legislature intended to exclude husbandry from the trades and businesses dealt with generally it did so in terms.

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(1) [1935] A. C. 422.

He admitted that s. 25 creates some difficulty, but he said that it might be that the authorities would think it right to allow as a deduction for income tax purposes under sch. B the amount of the national defence contribution paid. He said as regards the provisions of the Fourth Schedule with reference to carrying forward a loss and claiming deductions for wear and tear that it may be that farmers are not able to get the benefit of those provisions if they have not kept accounts, but that there was nothing to induce the court to limit the ordinary meaning of the words used in s. 19 which expressly includes investment companies in the businesses which are dealt with, and he pointed out that such companies are not dealt with in the Income Tax Acts under sch. D. They are dealt with, at any rate in part, under sch. C. He contended that that afforded an answer to the argument which Mr. Bowe based on s. 20, sub-s. 1. He also pointed out that, as the Crown has the right of choosing between the cases, the words "or would be so computed if income tax were chargeable under "that case in respect of the profits so arising" had no content or purpose at all. It may be that that was putting the matter too high, for, as Mr. Bowe replied, the principles of computation under case I. of sch. D are not the same as the principles under the other cases. As to *Simpson* v. *Grange Trust, Ld.* (1), the Solicitor-General submitted that that case was far from the present and that the provisions of s. 39 of the Finance Act (No. 2), 1915, threw much more light on the construction of the Finance Act, 1937, than that case did.

I am unable to get any help on the construction of this Act from *Simpson* v. *Grange Trust, Ld.* (1). In my opinion, the general words of s. 19, sub-s. 2, are so wide that they must be taken in their literal interpretation to include all trades or businesses which are dealt with under the Income Tax Acts under schedules other than sch. D. I am unable to accept the interpretation which Mr. Bowe puts on s. 20, sub-s. 1. That interpretation would put a further, and unnecessary, limitation on the general words of s. 19. I think that s. 25 can be read, although I agree the draftsmanship is not satisfactory, so that

(1) [1935] A. C. 422.

the amount of national defence contribution shall be deducted—and I think it ought to be deducted—from the income tax payable under sch. B or sch. A or any other schedule. I think it may have been contemplated that the provisions in the Fourth Schedule which apply to loss and wear and tear would not apply in the case of certain farms, and in this connection I think it is of some importance to observe that national defence contribution only applies to businesses which are earning more than 2000*l*. a year. It may very well have been thought, therefore, that no farmer who earned as much as that would fail to keep accounts. For these reasons, I am of the opinion that the persons who carry on the business of husbandry and make sufficient profits are liable to national defence contribution.

On the second point, the commissioners have held that on this farm there is being carried on a business of breeding thoroughbred stock on business principles and for the purposes of profit, and that there is also being carried on, for the purposes of the recreation of the owners, breeding from their own mares with a view to racing. The racing establishment and its accounts are kept entirely separate from the stud farm, but on the stud farm the owner keeps a few mares of her own and sends those mares either to her own or to other people's stallions, and races the stock so bred. There is nothing to show that this was anything but amusement or recreation on the part of the appellant, and I think there was evidence on which the commissioners could find, as they did find, that, while the main business of the stud farm was a commercial undertaking, the breeding from the appellant's own mares was not a commercial undertaking but was a matter of recreation. Whether or not the figures which have been arrived at by agreement were properly arrived at I have no means of knowing. It appears to me that the greater part of the expenses of the appellant's stud farm ought to have been attributed to and charged against the receipts of that farm. It might have been contended that the principle which has been applied in other cases of de minimis non curat lex might have been applied to the recreation side of the appellant's stud farm, but it was not so applied by the commissioners and they have found that the two activities, as they call them, can be separated. I am of opinion that there was evidence on which the commissioners could find as they did, and that, they having so found, I cannot interfere. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Ward, Bowie & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

KERR *v.* KENNEDY.

1942
Feb. 4, 5,
20.

Defamation — Slander — Imputation of unchastity — "Lesbian" — Slander of Women Act, 1891 (54 & 55 *Vict. c.* 51), *s.* 1.

An allegation that a woman is a "lesbian" is an imputation of unchastity within s. 1 of the Slander of Women Act, 1891.

ACTION tried before Asquith J., without a jury.

The plaintiff, Mrs. Innes Margaret Kerr, alleged that the defendant, Lady John Kennedy, had uttered and published to a common acquaintance of the parties a statement that the plaintiff was a "lesbian." It was contended on behalf of the plaintiff that an allegation of lesbianism was an imputation of "unchastity" within the meaning of that word in s. 1 of the Slander of Women Act, 1891 (1). The defence raised was (1.) that the words complained of were never spoken or published by the defendant; (2.) that, if spoken, they were incapable of a defamatory meaning; and (3.) that they were not actionable without special damage, which the plaintiff had neither pleaded nor proved.

(1) By Slander of Women Act, 1891, s. 1: "Words spoken and "published after the passing of "this Act which impute unchastity "or adultery to any woman or "girl shall not require special "damage to render them action-"able."

Valentine Holmes for the defendant. This action cannot be maintained. The use of the word "lesbian" to describe sexual perversion practised between women would appear to be of recent origin ; and it is doubtful whether the word was so used in 1891 when the Slander of Women Act was passed. The use of the word with this meaning seems to have been unknown to the compilers of Murray's Oxford Dictionary, published in 1908, for the various meanings there given to the word contain no suggestion of sexual practices. The Act of 1891 refers to imputations of "unchastity or adultery," and its application must be restricted to illegitimate intercourse between opposite sexes.

G. O. Slade for the plaintiff. "Unchastity" is not limited to relations between opposite sexes. In Webster's Dictionary "lesbianism" is defined as "unnatural sexual relations "between women." "Unchastity" is defined in the New English Dictionary as "sexual impurity, or lasciviousness," and in Johnson's Dictionary as "lewd, libidinous, not continent, "not pure." In the Concise Oxford Dictionary "chaste" is defined as "abstaining from unlawful or immoral practices ; "also from all sexual intercourse." The Act of 1891 was passed as a result of the decision of the Court of Appeal in *Speight* v. *Gosnay* (1). It is a remedial statute and as such should receive an equitable and liberal construction. If it had been intended to limit its operation to immorality between opposite sexes it would have said "fornication or adultery." Clearly the addition of "adultery" is surplusage. He referred to Gatley's Law of Libel, 3rd ed., pp. 77, 78, and the judgment of Scrutton L.J. in *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ld.* (2).

Cur. adv. vult.

1942. Feb. 20. ASQUITH J. read a judgment in which, having stated the facts and found that the words complained of were defamatory and were spoken by the defendant, he continued : The question of law remains. No actual pecuniary damage has been pleaded or proved. Hence the plaintiff

(1) (1891) 60 L. J. (Q. B.) 231.

(2) (1934) 50 T. L. R. 581, 584.

must fail in her action or bring the facts within one or other of the four categories of slander in which damage is, according to the current phrase, presumed. Of these categories of slander the only relevant one is that in which the slander imputes unchastity or adultery to a woman, within the Slander of Women Act, 1891.

Before considering whether the present slander falls within this category, it is pertinent to consider what is meant by saying that in the four special categories damage is presumed. What is so meant would seem to be that these exceptional slanders are either so obviously damaging to the financial position of the victim that pecuniary loss is almost certain, or so intrinsically outrageous that they ought to be actionable even if no pecuniary loss results. The slander of a person in the way of his profession or trade is an example of the first class. A slander imputing certain infectious diseases is an example of the second. A novelist falsely said to suffer from leprosy may suffer no falling-off in his sales—his sales may rise—but he will be shunned and avoided and he shall have his action on that account irrespective of cash. The false imputation of unchastity, in whatever sense of the term, to a woman falls within both of these classes since it is calculated both to bring her into social disfavour and, as the phrase runs, to damage her prospects in the marriage market and thereby her finances.

It is contended for the defendant that an imputation of lesbianism is not an imputation of unchastity within the Act of 1891, the argument being that the term "unchastity" in that Act is limited to unchastity between a woman and a man, and excludes immorality between persons of the same sex. In weighing this argument, certain considerations should, I think, be ruled out. Firstly, it is quite irrelevant that lesbianism is not a criminal offence. Fornication is not a criminal offence either, but no one disputes that that is covered by the term "unchastity." Secondly, it is, in my view, equally irrelevant that lesbianism is not a matrimonial offence or a ground for divorce. Gross indecency between males, falling short of sodomy, is not a ground for divorce either. We are here

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concerned, not with grounds for divorce or with matrimonial law, nor indeed with the law of settlements of property or the construction of a "dum casta" clause. What we are concerned with is defamation, and, in particular, the defamation of a woman qua woman. Again, it is, in my view, not important, even if true, that in 1891 lesbianism, either as an expression or a practice, was not prominent in the public eye or not so prominent as it has since become. As a phenomenon it has existed for at least 2500 years, and I should be much surprised if, under whatever name, the parliamentary draftsmen of the 1890's were ignorant of its existence. To assume this to be the case one must assume that they had little or no knowledge of the literature of the ancient world: an assumption which I make bold to repel.

These, however, are negative considerations. Affirmatively it may be observed, first, that, if the Act had intended to limit its purview to relations between opposite sexes, it could easily have spoken, as has been pointed out by Mr. Slade, not of "unchastity or adultery" but of "fornication or adultery," thereby covering intersexual relations only under two heads—(*a*) where neither party is married and (*b*) where one or both are married. I do not stress this or similar considerations, as the Act on any view is ill-drafted. Whatever meaning is attached to the word "unchastity," the addition of "adultery" is surplusage, for "unchastity" must, at the very least, include adultery. Secondly, and lastly, the true approach to the construction of "unchastity" seems to me to appear when the question is put: "What imputations on a woman, qua woman, "in the sphere of sexual morality, are grave enough to be "actionable without proof of pecuniary loss, or so likely to cause "pecuniary loss as not to call for such proof?" Can any distinction be drawn on this basis between adultery and fornication, on the one hand, and unnatural relations with other women, on the other, except that the imputation of the latter is, if anything, more wounding, more likely to excite abhorrence on the part of average reasonable people, more likely to spoil the victim's prospects of marriage? No such distinction can, in my view, be drawn. Whatever value, high or low, is ascribed to chastity to-day, it does seem to me to be nothing less than fantastic to say of a woman: " She is a "notorious lesbian, but she is perfectly chaste." In the absence of any judicial guidance or authority as to the meaning of " unchaste " or " chaste " in this connection, dictionaries can be consulted and their definitions have been cited in this case. Almost all, under the term " unchastity," include " impurity," " lasciviousness," and the like. Can anyone doubt that lesbianism is covered by such terms? In my view, the imputation of lesbianism is an imputation of unchastity within the Act of 1891, and the legal objection of the defendant fails.

I assess the damages at 300*l*., and I give judgment for that sum, with costs.

Solicitors for plaintiff: *Hasties.*
Solicitors for defendants: *Withers & Co.*

A. W. G.

SCOTT *v.* SEYMOUR.

C. A.
1941
June 26, 27.

Workmen's compensation—Accident arising out of and in the course of employment—Domestic servant on farm—Accustomed to ride on horseback—Knowledge of employer—Sent on errand—Rode back on horse being led to farm—Thrown and injured—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1, 2.

The appellant, a farmer's daughter, aged fifteen years, was employed by another farmer as a domestic servant. She was accustomed to riding horses, and that fact was known to her employer. She was sent by the farmer's wife to take tea to the farmer about two miles from the farm. As was her duty, she waited to take back the tea can until the farmer had finished his meal. On her return journey she encountered a farm horse being led back to the farm, and, having obtained the leave of the man in charge of the horse, she mounted it. A few minutes later a farm boy tried to jump on the horse's back behind her. The horse bolted, threw her, and dragged her along the ground, and she was injured:—

Held, that the accident arose out of and in the course of the girl's employment.

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Appeal from Newcastle-upon-Tyne county court.

The facts with regard to the accident are stated in the headnote. The appellant claimed compensation under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, on the ground that the accident arose out of and in the course of her employment. The county court judge found that it was not part of the appellant's duty to ride the horse, but that she enjoyed riding and it was a frolic of her own, and that, therefore, an accident occurring as the result of the ride could not be said to arise out of her employment, so that she was not entitled to compensation. The appellant appealed.

Rewcastle K.C. and *R. Ritson* (*Sexton* with them) for the appellant. The fact that the appellant rode a horse on her return journey to the farm cannot affect the further fact that the accident arose out of and in the course of her employment. If she had walked back to the farm, or ridden in a cart or on a bicycle no question would have arisen, and her riding on horseback does not affect the position. In *Seviour* v. *Somerset Collieries, Ld.* (1), the Act was held to apply, although the workman was doing something that was expressly prohibited by statute and by his employers' orders when the accident occurred, and in *Noble* v. *Southern Railway Co.* (2) the workman was doing something that was forbidden by his employers' rules. Again, in *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (3), it was held that once it was found that the act which the workman was seeking to do was within the scope of his employment, the question of negligence, great or small, in doing the act was irrelevant. There are a number of other cases to the same effect. Here the riding of a horse by the appellant was not forbidden by her employer, nor was her doing so negligent or, for her, dangerous in any way.

Sellers K.C. and *Harry Samuels* for the employer. This case cannot come within s. 1, sub-ss. 1, 2, of the Act of 1925. When the accident happened the appellant was doing something that did not arise out of her employment. She was taking a ride on horseback for her own pleasure. The county court judge was right in the view which he took. [They cited *Borley* v. *Ockenden* (4).]

(1) (1940) 162 L. T. 403.
(2) [1940] A. C. 583.
(3) [1939] A. C. 71.
(4) [1925] 2 K. B. 325, 55.

MACKINNON L.J. The question for our determination is whether, the accident clearly having arisen in the course of the appellant's employment, it arose out of her employment? Looking at the facts proved, it seems to me impossible to find that the accident did not arise out of her employment within the terms of the Act. It was part of the appellant's duty, which she was fulfilling, to go back to the farm, taking the tea can with her. If she had walked and had been knocked down by the horse on the way, clearly she would have been entitled to recover. If she had borrowed a bicycle from one of the farm hands, and had been hurt by a motor car on the way home, similarly, I think, there could be no doubt that she could have recovered. If there had been a farm cart attached to the horse and she had asked the man if she might have a lift back to the farm in the cart and had got into the cart and the horse had bolted and upset the cart, again there could be, I think, no arguable case that she would not have been entitled to recover. I cannot see that it makes any difference that, instead of getting into a cart, she mounted the horse to ride back.

Various cases have been cited to us. I think it would be possible, owing to the industry which reporters and text-book writers have bestowed on this Act, to find some case or some sentence in support of the most obviously fallacious argument which could ever be adduced during the hearing of cases under the Act. I do not think it necessary to refer to any of the authorities. It would be very remarkable if the appellant failed to recover whereas the workman in *Seviour* v. *Somerset Collieries, Ld.* (1) was entitled to recover. There the workman was not doing so safe a thing as riding a horse along a country lane. He was riding in a truck full of coal along an underground passage in a mine where the roof was often so low that anybody who was so riding would knock his head, which he did. Moreover, he was doing that in defiance of a rule issued by his employers that nobody was allowed to ride in that way. None the less, it was held that he was entitled to recover under the provisions in the proviso to s. 1, sub-s. 2, of the Act of 1925, that a man is still deemed to be acting in the course of his employment even if he is acting without instructions or in contravention of any statutory or other regulation. Nobody forbade the appellant to ride the horse and Mr. Sellers says that s. 1, sub-s. 2, has no

(1) 162 L. T. 403.

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application because it only applies when the workman is doing something in contravention of an order. It would be remarkable if disobedience to an order should give a workman a right to compensation but his accepting permission to do something deprived him of it on the ground that he was indulging in a frolic of his own. In my opinion, in the present case there was no evidence on which the county court judge could properly hold that this accident did not arise out of the appellant's employment. The appeal must be allowed and the case remitted to the county court judge to assess the amount of compensation.

Luxmoore L.J. I agree. The question whether an accident arises out of a person's employment has been held on many occasions to be one of fact. The latest reported case is *Noble* v. *Southern Railway Co.* (1), where Lord Maugham said (2) that there were three questions which ought to be considered in cases where there has been a contravention by an injured workman of some regulation or order, but the first of those questions appears to be of general application. "First, "looking at the facts proved as a whole, including any "regulations or orders affecting the workman, was the "accident one which arose out of and in the course of his "employment ?" Here the facts were that the appellant had taken out to her employer a can of tea. It was her duty to wait while he had his tea and to bring the empty can back to the farm. She was in the course of performing the latter part of her duty when she was permitted by a farm hand, who was in charge of the farm horses, to ride one of them back to the farm. The accident occurred while she was doing so, but it was through no fault of her own, it being entirely due to the interference of one of the farm hands. I should have thought that, as the accident happened in those circumstances, it was within the scope of her employment and, therefore, arose out of it.

The county court judge, however, refused to accept that view and found that the appellant's riding of the horse was a "frolic of her own." I fail to appreciate the ground for this conclusion and think that there was no evidence to justify it. The case would have been different if the judge had found that the appellant was riding the horse, not as a means of returning to the farm or in the course of such returning, but for a ride in some other direction wholly unconnected with any of her duties. The difficulty may be due to the fact that horse-riding is an unusual mode of progression for a female domestic servant. Suppose, however, that, instead of a horse, the appellant had mounted a bicycle. Could anyone have said that, if an accident had occurred on her way back to the place of her employment, such a method of progression was outside the scope of her employment ? As the county court judge said, there was nothing inherently dangerous or obviously reckless in riding back to the farm. Indeed, it was obviously far less dangerous, as my Lord has pointed out, than the riding in the coal truck in *Seviour* v. *Somerset Collieries, Ld.* (1). The county court judge based his decision mainly, I think, on the fact that the appellant enjoyed riding which was the motive with which she rode the horse, but motive is immaterial, as Lord Wright said in *Noble* v. *Southern Railway Co.* (2). Dealing with the argument that was put in that case with regard to the motive of the railway employee who was walking along the line, he says: "His motive . . . . in "choosing to go by the prohibited route is immaterial, whether "it was to save time or to save himself trouble," and then: "The test is objective and depends on the fact that his "proceeding to the station was within the sphere of his "employment." Here the appellant's duty was to get back to the farm. The proceeding to the farm was within the sphere of her employment. The fact that she was riding on a horse seems to me to be wholly immaterial from that point of view. I agree that the appeal should be allowed and the case remitted.

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(1) [1940] A. C. 583.

(2) Ibid. 591.

DU PARCQ L.J. I agree. I wish to say, although it has been said often enough, that these cases clearly depend in the main on the facts of each particular case, and I fully accept, as Mr. Sellers said, that it is not for this court to interfere with findings of fact by the county court judge. I come to the conclusion that this appeal should be allowed because I accept the findings of fact of the county court judge. They are these. First, the appellant was using the horse as a means of getting back to the farm with the can which had contained the farmer's tea as it was her duty to do. Secondly, the means which she adopted was not an obviously reckless or dangerous way of returning to the farm. Thirdly, the method adopted was not prohibited. Fourthly, the appellant chose the method mainly because she liked it. Fifthly, the accident occurred because a young man ran after the horse and the horse reared and bolted. In my view, the only possible conclusion from those findings is that the accident arose out of and in the course of the appellant's employment. They were important findings, but they were not all material findings, because I agree that the fourth finding is really immaterial. With great respect to the learned judge it is easy to see that that is the point at which he goes wrong in his judgment. He treats the question of motive as if it were conclusive, whereas it is not material. He puts the question to himself: "Was the applicant in fact engaged in performing her "duty to her master when she met with her terrible accident?" Stopping there, I should have thought that the answer was: "Yes." She was using the horse as a means of getting back to the farm, as it was her duty to do. The county court judge has further found that she was using a means which was not, on the face of it, dangerous or, I think one may say, improper, but then he puts the question in this way: "It is true that "she had to take the tea can home and that she had it with "her on the horse, but is this enough? Was she rightly or "wrongly riding the horse in order to take the tea can home "or was she riding the horse for some personal reason, 'some "'frolic of her own'?" I understand from that that, if the learned judge had thought that she was rightly riding the horse to take the tea can home, he would have decided in her favour, and, if he had thought that she was wrongly riding the horse to take the can home, he would have decided in her favour. By that I suppose he means that, even if he had thought that it was not a very regular or proper way, or even if it was a negligent way, of getting the can home, he would still have decided in her favour if that was the object of her journey. I have no doubt, applying the objective test (which it seems to me clearly, apart from authority, must be applied) that she was riding the horse to take the can home. The county court judge continues, as if this was the really conclusive question: "or was she riding the horse for some "personal reason, 'some frolic of her own'?" That clearly raises the question whether a judge is entitled to say: "Here "is an act which, judged objectively, is for the benefit of the "employer and is part of the work of the workman and is "not being done either contrary to orders or with any

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(1) 162 L. T. 403.

(2) [1940] A. C. 583, 599.

"apparent increase in the risks of the employment. If the "workman is doing it without thinking of his own enjoyment "it is within the scope of his employment, whereas if he "prefers the method for his own enjoyment it is not within "the scope of his employment." That is, fortunately, I think, a wrong view of the law. I say " fortunately " because if it were necessary for the judge to go into these abstruse psychological questions his task would be a great deal more difficult than it is now. I entirely accept, as I say, the findings of the learned judge and on those findings I think we are bound to come to the conclusion to which my brethren have come.

With regard to a great many of the passages which have been read from various cases and in particular the words of Lord Atkinson in *Barnes* v. *Nunnery Colliery Co., Ld.* (1), on which the learned judge very much relies, I venture to repeat what was said by Lord Wright in *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (2), referring to *Plumb* v. *Cobden Flour Mills Co., Ld.* (3) : " In particular Lord Dunedin there "pointed out that most of the erroneous arguments put before "the courts in this branch of the law will be found to depend "on disregarding the salutary rule that a test convenient in "a particular case must not be allowed to dislodge the original "words of the Act. I venture to add that the tendency to "disregard the words of the Act and substitute extracts from "judgments is largely responsible for the accretion of thousands "of cases round a legislative measure which was intended to "be administered rather than litigated upon." If one looks at the findings of the judge here and the words of the Act, it seems to me only one conclusion is possible. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant : *Corbin, Greener & Cook, for J. E. Brown-Humes & Co., Bishop Auckland.*

Solicitors for employer : *Hyman Isaacs, Lewis & Mills, for Patrick Bennett, Maddison & Wainwright, Newcastle-on-Tyne.*

(1) [1912] A. C. 44.
(2) [1939] A. C. 71, 89.
(3) [1914] A. C. 62.

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1941
Nov. 19, 20, 21; *Dec.* 12.

ROOMWOOD INVESTMENTS, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

TITCHFIELD *v.* SAME.

PENANG AND GENERAL INVESTMENT TRUST, LIMITED *v.* SAME.

Revenue—Income tax—Super-tax—Undistributed income of company—Income of company deemed to be income of members—Members not assessable to super-tax—Apportionment of income—Attribution of interest to member—Powers of Special Commissioners—" Income " arising under a settlement "—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1*—Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-s.* 3*—Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 41, *sub-s.* 4 (*a*) (ii.).

Sect. 21, sub-s. 1, of the Finance Act, 1922, with a view to preventing the avoidance of the payment of super-tax through a company withholding its income from distribution provides that: " Where it appears to the Special Commissioners that any " company to which this section applies has not . . . . distributed " to its members in such manner as to render the amount dis- " tributed liable to be included in the statements to be made by " the members of the company of their total income for the " purposes of super-tax, a reasonable part of its actual income," the Commissioners may, by notice in writing, direct that for purposes of assessment to super-tax, the income of the company shall for the year or other period specified in the notice, be deemed to be the income of the members :—

Held, that this power is exercisable even when the only members of the company are corporations or trustees, and not, therefore, liable to be assessed to super-tax.

The income of a company for the year ending July 8, 1937, was 101,692*l.*, of which 94,835*l.* was apportioned under the Finance Act, 1922, s. 21, to the trustees of a settlement who held all the ordinary shares. An assessment was then made under the Finance Act, 1938, s. 38, on Lord T. as the settlor in respect of this sum less two dividends paid to the ordinary shareholders during the financial year ending April 5, 1938. Another dividend had been paid by the company before the commencement of this financial year but during the year of the company ending July 8, 1937.

Held, that strictly speaking the Commissioners were under no obligation to deduct any of the dividends, but that they had properly done so as regards those paid in the same financial year in respect of which sur-tax had already been paid. Their act in refusing to do so in respect of the earlier dividend was, however, unimpeachable.

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The power given to the Special Commissioners by s. 14, sub-s. 3, of the Finance Act, 1937, in determining the respective interests of the members of a company for the purpose of apportioning income, in accordance with s. 21 of the Finance Act, 1922, to "attribute to each member an interest corresponding to his "interest in the assets of the company available for distribution "among the members in the event of a winding up" is subject to no limitation.

Decisions of Macnaghten J. affirmed.

APPEALS from Macnaghten J.

ROOMWOOD INVESTMENTS, LIMITED v. INLAND REVENUE COMMISSIONERS.

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Roomwood Investments, Ld., was incorporated on June 20, 1933, and by an agreement dated June 24, 1933, the company acquired from the Marquess of Titchfield a sum of stock and his interest during the lives of the Duke of Portland and himself and the survivor of them in certain investments in consideration of the sum of 903,000*l.* payable as and when demanded by the marquess with interest at 4*l.* per cent. per annum. The authorized and issued capital of the company was 1000*l.* divided into fifty ordinary shares of 1*l.* each and 950 six per cent. cumulative preference shares of 1*l.* each. The fifty ordinary shares were held by the marquess until February 10, 1937, when they were transferred to the trustees of a settlement dated February 19, 1937, made by the marquess, as settlor. The preference shares were originally held by various individuals, but on February 26, 1937, 800 preference shares were transferred to the marquess, the remaining 150 preference shares being held by five other persons. The accounts of the company were made up to July 8 in each year and the income of the company for the year ended July 8, 1937, was 101,692*l.* The company came within the provisions of s. 21 of the Finance Act, 1922, by virtue of the provisions of the Finance Act, 1936, and on February 9, 1939, a direction was issued by the Special Commissioners under s. 21, sub-s. 1, of the Act of 1922 that the actual income of the company for the year ended July 8, 1937, should be deemed to be the income of the members of the company and that this amount should be apportioned among the members. No appeal was made by the company against this direction and on March 17, 1939, the income of 101,692*l.* was apportioned to the marquess. The company appealed against the apportionment.

Out of the profits of the company for the year ended July 8, 1937, the company paid the following dividends on its ordinary shares to the trustees of the settlement dated February 19, 1937: On February 26, 1937, an interim dividend of 34,000*l.* net, being 44,590*l.* gross. On April 16, 1937, another interim dividend of 23,500*l.* net, being 31,333*l.* gross. On July 20, 1937, a final dividend of 12,900*l.* net, being 17,200*l.* gross. On October 10, 1936, the sum of 6800*l.* had been paid to the marquess on account of purchase money payable under the deed of June 24, 1933. The Special Commissioners subsequently amended the apportionment by apportioning 6848*l.* to the marquess, being the instalment of purchase money already mentioned together with 48*l.* preference dividend, 9*l.* to the other preference shareholders, and 94,835*l.* to the trustees of the settlement. The sum apportioned to the trustees of the settlement included the three dividends paid to them. During the fiscal year April 6, 1937, to April 5, 1938, the trustees received 104,656*l.* gross which included the two dividends paid by the company for April 16 and July 20, 1937. This income fell to be treated as the income of the marquess by virtue of s. 38 of the Finance Act, 1938, and was included by him in his statement for purposes of sur-tax for the year 1937–1938 and he paid sur-tax in respect of it. An additional assessment to sur-tax was made on the marquess for the sum of 46,302*l.* for the year ended April 5, 1938. It consisted of the sum of 94,835*l.* apportioned to the trustees, less the two dividends paid on April 16 and July 20, 1937.

The company appealed against the amended apportionment made under s. 21 of the Finance Act, 1922, and the marquess appealed against the additional assessment to sur-tax of 46,302*l.* The matter complained of in the amended apportionment was the apportionment of 94,835*l*. to the trustees of the settlement and the grounds of complaint were that the apportionment was not warranted by the Act, that no apportionment could lawfully be made on the trustees of the settlement who were not members of the company for the purpose of apportionment and, alternatively, that the amount apportioned was excessive. The marquess contended that the dividend of 34,000*l*. net paid by the company to the trustees on February 26, 1937, should not be included in the computation of his income for the year ending April 5, 1938. He did not contend that income arising under the settlement could not be treated as his income under the Finance Act, 1938, s. 38, sub-s. 2. Macnaghten J. said that the argument in support of the company's appeal against the apportionment ultimately rested on the construction of para. 8 of the First Schedule to the Finance Act, 1922, which provided that "the "apportionment of the actual income from all sources of the "company shall be made by the Special Commissioners in "accordance with the respective interests of the members." It was contended that the concluding words should be read "in accordance with the respective beneficial interests of the "members." He could see no reason for the insertion of the word "beneficial." On the contrary it seemed clear that the Special Commissioners were entitled and, apart from other provisions of the Finance Acts, were under the duty, to apportion the income in accordance with the interests of the members as set forth in the memorandum and articles of association of the company, and the company was not concerned with any equitable interests in shares and no notice of any equity could be entered on the register. The company's appeal, therefore, failed, and the appeal of the marquess against the additional assessment made on him must also fail. The company and the marquess appealed.

Cyril King K.C. and *F. Grant* for the appellants. The apportionment to the trustees of the settlement is invalid. Trustees as such are not liable for sur-tax, and the whole object of apportionment under s. 21, sub-s. 1, of the Finance Act,

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1922 (1), is to ensure a distribution of the company's profits to persons liable for sur-tax. The section does not enlarge the range of sur-tax, the apportionment must be to persons who are entitled beneficially to the income distributed by the company, and the marquess has no interest in the income of the settled funds. The word "beneficial" must be regarded as read into the Finance Act, 1922, sch. I., para. 8, so as to make the concluding words read "in accordance with the "respective beneficial interests of the members." If the appeal against the apportionment succeeds, it necessarily follows that the assessment on the marquess cannot stand. The assessment is made on him under s. 38, sub-s. 2, of Finance Act, 1938, and it is not contended that it does not cover the assessment here so as to make him assessable as settlor, but the additional assessment complained of is wrong in amount even if the apportionment stands. Sect. 38, sub-s. 2, does not amend s. 21 of the Finance Act, 1922 (1). It is directed to a different state of things. It covers cases where no company exists. The question is in what year does the dividend paid in February, 1937, come. It is contended that it is in the financial year 1936-1937 and that there is no statutory provision to bring it into the year 1937-1938, and s. 38 of the Act of 1938 only applies retrospectively to the financial year 1937-1938:

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(1) Finance Act, 1922, s. 21, provides: "With a view to "preventing the avoidance of the "payment of super-tax through "the withholding from distribution "of income of a company which "would otherwise be distributed, "it is hereby enacted as follows: "(1.) Where it appears to the "Special Commissioners that any "company to which this section "applies has not, within a reasonable time after the end of any "year or other period ending on "any date subsequent to the "fifth day of April, 1922, for "which accounts have been made "up, distributed to its members "in such manner as to render the "amount distributed liable to be "included in the statements to be "made by the members of the "company of their total income "for the purposes of super-tax, "a reasonable part of its actual "income from all sources for the "said year or other period, the "Commissioners may, by notice "in writing to the company, "direct that for purposes of "assessment to super-tax, the "said income of the company "shall, for the year or other period "specified in the notice, be "deemed to be the income of the "members, and the amount thereof shall be apportioned among "the members."

see sub-s. 7. The Crown relies on s. 41, sub-s. 4 (*a*) (ii.), of the Act of 1938 (1), taken in conjunction with sch. I., para. 9, to the Finance Act, 1922, in the form substituted by the Finance Act, 1927, s. 31, sub-s. 8, as causing the income to be assessable to sur-tax as though it had been received at the end of the company's year in July, 1937, so as to bring it within the financial year 1937-1938, but this is erroneous. Para. 9 of sch. I. deals with "income apportioned to a "member of a company." It has already been contended that nothing could be apportioned to the trustees of the settlement or the marquess. In any case it is plain that the trustees on whom the apportionment has been made are not "assessable and chargeable to super-tax" so as to make para. 9 apply. There is nothing in the paragraph to say that income apportioned to trustees is to be deemed to be received at any particular date and the marquess is not assessable under the Act of 1922. Clearly then the dividend can only be treated as received in February, 1937, and it should be omitted for the additional assessment upon the marquess.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. The appellants have confused two things—when the company earned the income in question and when the dividend was paid. The assessment of 94,835*l.* comes within s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938, and while, in assessing the marquess, it was proper to deduct from that the two dividends paid during the financial year 1937-1938 which had already been assessed to sur-tax in the hands of the marquess, the earlier dividend paid in February, 1937, was not included in any assessment to sur-tax and ought not, therefore, to be deducted.

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(1) By Finance Act, 1938, s. 41, sub-s. 4: "For the purposes of "this part of this Act—(*a*) the "expression 'income arising under "'a settlement' includes—(ii.) "where the amount of the income "of any body corporate has been "apportioned under s. 21 of the "Finance Act, 1922, for any year "or period, or could have been so "apportioned if the body corporate were incorporated in any "part of the United Kingdom, so "much of the income of the body "corporate for that year or period "as is equal to the amount which "has been or could have been so "apportioned to the trustees of "or a beneficiary under the "settlement; . . . ."

It is true that the Finance Act, 1927, s. 31, sub-s. 2, provided that in making an assessment the Commissioners should deduct in the case of each member "any amount which has "been distributed to him by the company in respect of the "said year or period," but in the case of an assessment on a settlor under the Finance Act, 1938, s. 38, that addition to s. 21, sub-s. 1, of the Finance Act, 1922, has no application. It is only to prevent double taxation that the Commissioners deducted the two dividends which had already been assessed to and borne sur-tax. The apportionment to the trustees of the settlement is lawful under s. 21 of the Act of 1922. It is clear that an apportionment would not involve any assessment to sur-tax if the income of the members were too low to attract sur-tax, but it would still be right to make the apportionment. Because the apportionment is directed to insuring that income shall not escape sur-tax, it does not follow that as the result of the apportionment any sur-tax will be payable. There is no reason why the apportionment should not have been made to the trustees of the settlement. The apportionment is therefore proper and the additional assessment on the marquess correct and both appeals should be dismissed.

King K.C. replied.

Cur. adv. vult.

H. C. G.

PENANG AND GENERAL INVESTMENT TRUST, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

Penang and General Investment Trust, Ld., was formed to carry on the business of an investment trust and was an "investment company" as defined by s. 20 of the Finance Act, 1936, so that s. 21 of the Finance Act, 1922, applied to it. It was incorporated on June 10, 1937, under the Companies Act, 1929, as a private company limited by shares with a capital of 856*l.* 11*s.* divided into 749 " A " ordinary shares of 1*l.* each, 100 " B " ordinary shares of 1*l.* each and 151 " C " voting shares of one shilling each. Under the articles of association the holders of the " A " shares were entitled in the event of a liquidation of the company to the whole of the surplus assets after repayment of the capital subscribed by the holders of the "B" and "C" shares, but they were not entitled to participate in any dividends distributed by the company. The holders of the "B" shares were entitled to all the dividends declared by the company and in a liquidation they were entitled to the capital subscribed on their shares. The holders of the "C" shares were entitled in a liquidation to repayment of the subscribed capital, but they were not entitled to participate in any dividends. By the articles of association Sir John Ramsden (hereinafter called "the "settlor") was appointed governing director of the company for life with power to nominate his successor. All the "A" and "B" shares were issued to him and he was originally the beneficial owner. By a deed of settlement dated June 24, 1937, made between the settlor, of the one part, and R. W. James and the settlor as trustees, of the other part, the "A" shares were settled upon the trusts set forth in the deed and were transferred into the names of the trustees. By another deed of settlement of the same date made between the settlor, of the one part, and Donald MacLeod, James Charteris Burleigh and the settlor as trustees, of the other part, the "B" shares were settled upon the trusts set forth in that deed and those shares were then transferred into the trustees' names. The first settlement was varied by a deed dated December 7, 1937, whereby the settlor was precluded from taking any benefit under it. The second settlement was likewise varied by a deed of the same date, but by another deed dated July 20, 1938, this deed was revoked and cancelled and it was provided that neither the settlor nor his wife should take any benefit under the settlement of the "B" shares.

The actual income of the company for the year of assessment ending April 5, 1938, was 81,974*l.* 2*s.* 1*d.*, but during that year it distributed no more than 2000*l.* The Special Commissioners accordingly directed under s. 21, sub-s. 1, of the Finance Act, 1922, as extended by s. 14, sub-s. 2 (*a*), of the Finance Act, 1937, that for the purpose of assessment to sur-tax the actual income of the company should be deemed to be the income of the members. Pursuant to s. 14, sub-s. 3, of the Finance Act, 1937, they apportioned the income as follows: To the trustees of the "B" shares, 100*l.*; to the holders of the "C" shares, 7*l.* 11*s.*; to the trustees of the "A" shares, 81,866*l.* 11*s.* 1*d.*, attributing to the members amounts corresponding to their interests in the assets in the event of a liquidation. The amount apportioned to the trustees of the "A" shares was assessed to sur-tax as the settlor's income by virtue of s. 38, sub-ss. 2 and 3, and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938. It was admitted that he had an interest in the income arising under the settlement of these shares within the meaning of s. 38, sub-s. 3, so as to allow it to be treated as his income for the purposes of the Income Tax Acts.

The company appealed against the direction and apportionment and the settlor appealed against the assessment. Macnaghten J. dismissed the appeal. The company and the settlor appealed.

J. Millard Tucker K.C. and *L. Stein* for the appellants. Since the company could only distribute its income to the holders of the "A" shares, who are the trustees of the settlement, the direction must be bad, since the trustees, not holding the shares beneficially, cannot be liable to sur-tax in respect of the dividends. Thus, it was not possible for the company to distribute its income "in such manner as to render the "amount distributed liable to be included in the statements "to be made by the members of the company of their total "income for the purposes of sur-tax." The provision authorizing the giving of such directions is penal: *Carnarvon Estates Co.* v. *Inland Revenue Commissioners* (1); *Aldwarke Co., Ld.* v. *Inland Revenue Commissioners* (2); and it cannot be right to penalize the company for failing to do something which it could not do. It follows further that, as no apportionment can be made to a member unless he is liable to sur-tax, the apportionment to the trustees was bad. Moreover, the Special Commissioners were not justified in attributing to the members amounts which corresponded to their interest

(1) (1935) 19 Tax Cas. 643, 658. (2) (1933) 18 Tax Cas. 125.

in capital, thus apportioning the income to persons who were only entitled to benefits in a winding-up. The effect of the method adopted is to produce a double assessment.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. There has been no double taxation in this case. Double assessment does not necessarily mean double taxation. The test of double taxation is whether the same person is paying tax twice over in respect of the same income: *Gilbertson* v. *Fergusson* (1); *Inland Revenue Commissioners* v. *Roberts* (2). When the Special Commissioners, in dealing with a highly artificial tax evasion scheme by a wealthy taxpayer, adopt a method of taxation which yields larger amounts than might otherwise have been recovered no legitimate complaint can be made that they have exercised their discretion capriciously. There is no obligation to interpret these provisions in a manner favourable to the taxpayer. It was contended that this legislation was penal, but in fact it is both penal and remedial and the proper mode of interpretation is stated in Maxwell on Interpretation of Statutes, 8th ed., p. 240, where reference is made to "the rule that that sense of the words is to be "adopted which best harmonizes with the context and promotes "in the fullest manner the policy and object of the legislature." At p. 253 with regard to statutes imposing pecuniary burdens it is said that "such Acts, like penal Acts, are not to be so "construed as to furnish a chance of escape or a means of "evasion." The point is not to decide whether such legislation is penal or remedial, but to find the intention of the legislature expressed in the words used and to interpret them so as to suppress the mischief and promote the remedy. A member of a company who is a trustee must make a return of the income which he receives as trustee for the purposes of the Finance Acts. [They referred to the Income Tax Act, 1918, s. 7, sub-s. 2; the Finance Act, 1922, s. 22, sub-s. 1; and the Finance Act, 1927, s. 44.] Under s. 21, sub-s. 2, of the Act of 1922 the only question is whether the company has made a certain distribution of part of its income. If not the matter comes within the Act. The operative part of the section is quite clear, and a person who cannot obey because he has taken steps to dispossess himself of his income is not protected.

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(1) (1881) 7 Q. B. D. 562, 570. (2) (1925) 9 Tax Cas. 603, 620.

Tucker K.C. in reply.

Cur. adv. vult.

F. C.

1941. Dec. 12. CLAUSON L.J. read the following judgment of the court (LORD GREENE M.R., CLAUSON and DU PARCQ L.JJ.). These appeals involve the consideration of s. 21 of the Finance Act, 1922, as amended by various later Acts, and of s. 38 of the Finance Act, 1938. It is convenient to deal with the construction and operation of these sections before applying them to the facts of the three cases under appeal.

Sect. 21 of the Act of 1922 recites that it is enacted with a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed. The section applies to certain companies the characteristics of which have been varied from time to time by the amendment of the section, but we need not burden this judgment with the varying details of these characteristics since it is admitted that the two companies which come into consideration in these three cases are possessed of the characteristics required for the applicability of the section. Assuming the section to be applicable to a particular company, the section does not become operative as regards it unless it appears to the Commissioners that for a year or period ending after April 5, 1922, for which accounts have been made up, the company has failed to distribute to its members "in such manner as to "render the amount distributed liable to be included in the "statements to be made by the members of the company of "their total income for the purposes of super-tax" a reasonable part of its actual income for the said year or other period.

Here emerges the first point material to these appeals. A corporate body is not liable to super-tax and cannot be called on to make a statement of its total income for super-tax. Further, an individual is not liable to super-tax in respect of income which he receives as a trustee, and he cannot be called on to include such income in a statement of his total income for super-tax. It was admitted for the purposes of argument, as we understand it, that if among the registered members there were to be found a single one who was an individual owning his shares beneficially and thus liable to have to make a super-tax return which would include any dividend paid on his share, and if the company failed to pay a reasonable dividend, it could be predicated of the company that it had failed to distribute a reasonable part of its income "in such "manner as to render the amount liable to be included in the "statements to be made by the members of the company "of their total income for the purposes of super-tax." It was, however, suggested that, if all the registered members of the company were either corporate bodies or persons holding their shares as trustees, it would be impossible for the company to distribute to its members a reasonable part of its income "in such manner as to render the amount distributed "liable to be included in the statements to be made by the "members of the company of their total income for the "purposes of super-tax," and thus the conclusion was reached that the condition for the operation of the section impliedly required that at least one member should be an individual holding his shares beneficially.

We agree with the view expressed on this matter by Macnaghten J. in his judgment in the *Penang* case. The language used appears to us to be amply accounted for by the desire of the legislature to prevent the avoidance of super-tax by the process of making a "capital" distribution whether by the device of bonus shares or otherwise. We cannot accept the view that the words used by the legislature were in substance a suggestion to those who might desire to frustrate the intention of the section to achieve that object by placing the shares in the names of corporate bodies or trustees. The words seem to us to bear a meaning which we can paraphrase thus: "in such manner as to render the "amount distributed super-taxable in the hands of a person "whose income is super-taxable."

C. A.
1941

Roomwood Investments, Ld. v Inland Revenue Commissioners.
Titchfield v. Same.
Penang and General Investment Trust, Ld. v. Same.

The next step to be taken to bring the section into operation in regard to a company is that the Commissioners should direct that for purposes of assessment to super-tax the company's income should for the relevant period be deemed to be the income of the members. This direction having been given, the amount of this income is to be apportioned among the members. By virtue of sub-s. 7 of s. 21, the expression "member" is to include any person having a share or interest in the capital or profits or income of a company. By virtue of sub-s. 8 of s. 21, the provisions in sch. I. to the Act of 1922 are to have effect in regard to apportionment and otherwise for the purpose of carrying into effect and in connection with s. 21. It is to be noted that under para. 8 of the schedule the apportionment is to be made in accordance with the respective interests of the members, that under para. 9 the income apportioned to a member is to be deemed to have been received by him on the date on which the accounts of the company for the relevant period were made up, and that under para. 10 the Commissioners are to notify the apportionment to the company by serving on it a statement of the income apportioned and either the amount apportioned to each member or the amount apportioned to each class of shares as they think fit.

It was suggested in the arguments in these cases that the effect of the provisions which we have so far mentioned was such that no apportionment could be made to a member unless he were a person who would be liable to super-tax, and that, therefore, an apportionment to a member who is a corporate body or is found to be a trustee would not be a valid apportionment. We agree with the view expressed by Macnaghten J. in his judgment in the *Roomwood Investments, Ld.* case that this is an erroneous view of the provisions in question. We see no difficulty at all in holding that the provisions to which we have so far referred plainly authorize the Commissioners to apportion the company's income to members on the register although they may not be liable to super-tax. We do not find it necessary to fortify the point by referring to the provisions of later legislation, but it is quite plainly the fact that the legislature in subsequent Acts assumed that such an apportionment would be a good one.

The apportionment having been made, the next step is to assess the super-tax chargeable in respect of the amount of the company's income apportioned to a member, and this is to be done (see sub-s. 2 of s. 21) by assessing it on the member in the name of the company, and it is to be payable by the company. For the purposes of the present case it is sufficient to say that since 1927 the statutory provisions to which we have referred must for all relevant purposes be read as referring to sur-tax in place of super-tax.

We do not propose to burden this judgment by going through the subsequent legislation in detail, but it is necessary to note that by virtue of the Finance Act, 1937, s. 14, sub-s. 3, the Commissioners are given power, in determining the respective interests of the members for the purpose of apportioning income, to attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding-up. It was suggested in argument before us that this power was one which must be read as subject to some implied limitation and was other than a power given by the legislature to the Commissioners without control or fetter. We do not appreciate what the implied fetter or limitation is suggested to be. In our opinion, the power thus given to them is quite unfettered.

We now turn to s. 38 of the Finance Act, 1938, which is in Part IV. of the Act under the heading "Income Tax "(Settlements)." It was common ground that the settlements with which the present cases are concerned were of such a character that, by reason of s. 41, sub-s. 4 (*a*) (ii.), of the Act of 1938, any income of a company apportioned to the trustees of the settlement under s. 21 of the Act of 1922 must be treated as "income arising under the settlement," and, accordingly, must, in view of s. 38, sub-s. 2, be treated as income of the settlor, in the one case Lord Titchfield and in the other Sir John Ramsden.

We now turn to the facts of the three cases. In the

Roomwood Investments, Ld. case the income of the company for the financial year ending July 8, 1937, was 101,692*l*. In February, 1939, the Commissioners issued a direction, admittedly valid, that that income should be deemed to be the income of the members of the company and that the amount should be apportioned. In the first instance, the whole amount was apportioned to Lord Titchfield: but this was admittedly inaccurate, and by arrangement the apportionment must now be treated as having been made as to 6500*l*. on Lord Titchfield as a loan creditor under certain provisions of the Finance Act, 1936 (with which it is unnecessary to deal, as no point is raised on this part of the apportionment), as to 48*l*. to Lord Titchfield as a preference shareholder, as to 9*l*. to certain other preference shareholders, and as to 94,835*l*. to certain members holding the whole of the ordinary shares who are in fact the trustees of a settlement of those shares made by Lord Titchfield. No question is raised of the validity of the apportionment to Lord Titchfield or to the other preference shareholders. The validity of the apportionment to the settlement trustees is, however, questioned on the ground that on the true construction of the Acts no apportionment can validly be made except to an individual who would be under liability to pay sur-tax on a dividend received by him on the shares held by him and the trustees would admittedly not be so liable. We have already expressed our views on this point. For the reasons we have given, the contentions of the company and of Lord Titchfield on this point must fail.

The only other question raised may be stated as follows. During the fiscal year April 6, 1937, to April 5, 1938, the settlement trustees received two dividends on their shares, one on April 16, 1937, and one on July 20, 1937. On these no question arises, but the trustees also received a dividend on February 26, 1937, of 44,590*l*. The amount of the company's income for the year ending July 8, 1937, which has been apportioned to them under s. 21 of the Act of 1922 comprises in it an amount of 44,590*l*. which has in fact gone to pay the dividend paid on February 26, 1937, that is, during the period in respect of which the company's income, the subject of apportionment, accrued, but before the commencement of the fiscal year in respect of which sur-tax has been assessed. In our judgment, the payment of the dividend is not material for the purpose of charging Lord Titchfield with sur-tax. He must be charged with sur-tax on the income arising under the settlement, that being treated as his income under s. 38 of the Act of 1938, and, by virtue of s. 41, sub-s. 4 (*a*) (ii.), of the Act of 1938, the income arising under the settlement includes the amount apportioned to the trustees irrespective of the fact that that amount comprised the profits which were in fact distributed in dividend. On this reading of the Act not only an amount of the profits corresponding to the February dividend is sur-taxable, but also the amounts corresponding to the April and July dividends. All these seem to us to be on the same footing, but the Commissioners (quite properly) do not seek to bring in the two latter dividends because they have in fact borne sur-tax in respect of the fiscal year 1937-1938, but, as we understand it, they are not prepared to release their claim in respect of the sum corresponding to the April dividend since that has not borne sur-tax for that year, or, indeed, any other year. In our view, the position they take in regard to this sum is quite unimpeachable.

We turn now to the *Penang* case. In this case the company's capital is divided into 749 "A" ordinary shares of 1*l.* each, 100 "B" ordinary shares of 1*l.* each, and 151 "C" voting shares of one shilling each. The "A" ordinary shares carry no dividend rights, but take all surplus assets in winding-up after repayment of the capital paid up on the other shares. The "B" ordinary shares are entitled to all dividends and to repayment of their capital in winding-up. The "C" voting shares are entitled to repayment of capital in a winding-up, but to nothing more, and, accordingly, to no dividends. The Commissioners exercised the power given to them by the Act of 1937, s. 14, sub-s. 3, and, finding that the company came within s. 21 of the Act of 1922 and had not made such a distribution as would save them from the operation of that section, apportioned the relevant income of the company to the extent of the capital paid up on the "B" shares and the "C" voting shares to the holders of those shares, and, as to the balance, to the holders of the "A" ordinary shares who were in fact the trustees of a settlement made by Sir John Ramsden of such a character that under the statutory provisions, which we need not again particularize, the amounts apportioned to the trustees were sur-taxable in Sir John Ramsden's hands.

The points taken for the company and Sir John Ramsden were as follows. First, it was said that the direction was bad because this company could distribute its income only to the holders of the "A" ordinary shares, that is, to the settlement trustees, and that, as they would not be liable to sur-tax in respect of shares which they did not hold beneficially, it was not possible for the company to distribute its income in such manner as to make it liable to be included in its members' statements for super-tax. We have already expressed our views as to the meaning of this part of the section, and on what we conceive to be the true construction of the section this point must fail. Secondly, it was said that no apportionment to trustees was authorized by the section. We have already dealt with this point, and on the view of the Act which we have already expressed it must fail. We ought to mention that counsel for the company and Sir John Ramsden were apparently prepared to admit that, if the trustees would be bare trustees of a dividend for an individual entitled to immediate payment from them, the apportionment to them might be valid, but the point, having regard to the terms of the settlement, did not arise. Thirdly, it was said that the Commissioners were not justified in exercising their discretion in apportioning the income according to capital rights. We have already expressed our opinion that the discretion left to them in this matter by the Act is wholly unfettered, and, accordingly, in our view, this point also fails.

The three appeals will be dismissed with the usual result as to costs.

Appeals dismissed.

C. A.
1941

Roomwood Investments, Ld.
v.
Inland Revenue Commissioners.
Titchfield
v.
Same.
Penang and General Investment Trust, Ld.
v.
Same.

Solicitors for Roomwood Investments, Ld., and Lord Titchfield: *Baileys, Shaw & Gillett.*

Solicitors for Penang and General Investment Trust, Ld. and Sir J. F. Ramsden: *Capel Cure, Glynn Barton & Co.*

Solicitor for Inland Revenue Commissioners: *Solicitor for Inland Revenue.*

H. C. G.
F. C.

EVERSFIELD *v.* STORY.

1942
Jan. 12, 13;
Feb. 3.

Justices—Probation of offenders—Duties and powers—Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1, *sub-s.* 1 — *Emergency legislation—National service—Refusal to submit to medical examination—Punishment—National Service Act,* 1941 (4 & 5 *Geo.* 6, *c.* 15), *s.* 4, *sub-s.* 2.

The effect of the Probation of Offenders Act, 1907, as amended by s. 8 of the Criminal Justice Administration Act, 1914, is that before proceeding to apply the terms of the statute to the case before it, a court of summary jurisdiction is to have regard to the age, character, antecedents and health of the offender; to the nature of the offence, whether of a grave or trivial character; and to the circumstances in which the offence was committed; and is then to decide whether it is expedient to deal with the case in one of the ways indicated by the statute, remembering that one of the objects to be sought is the prevention of any repetition of the same or the commission of any other offence. The discretion vested by the Act in courts of summary jurisdiction is wide and the High Court will not interfere with the lawful exercise of that discretion, but the Act is not to be used as a means of evading the law or of encouraging persistent offenders in their contumacy.

While it is doubtful whether the Act can properly be applied to any case of a deliberate refusal to obey the provisions of the National Service Acts, 1939–1941, it is clearly wrong for a court of summary jurisdiction to proceed under it where a person is

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Reported by C. G. Moran, Esq., Barrister-at-Law.

proved to have been guilty of an offence under s. 4, sub-s. 2, of the National Service Act, 1941, which involves persistent defiance of the law.

CASE stated by justices.

At a court of summary jurisdiction sitting at Norwich on October 4, 1941, the appellant, Philip Claude Eversfield, preferred an information under s. 4, sub-s. 2, of the National Service Act, 1941, against the respondent, Herbert Charles Story, for having on October 3, 1941, failed to comply with a justices' order made under s. 4, sub-s. 1, of that Act to submit himself for medical examination.

At the hearing the following facts were proved or admitted: On April 6, 1940, the respondent, in pursuance of the National Service Acts, 1939–1941, of a proclamation dated January 1, 1940, and of the National Service (Armed Forces) (Miscellaneous) Regulations, 1939 (St. R. & O., 1939, No. 1120), was provisionally registered on the register of conscientious objectors. In pursuance of s. 5 of the National Service (Armed Forces) Act, 1939, he applied to a local tribunal which on August 20, 1940, acting under s. 5, sub-s. 6*c*, of the Act, ordered that his name should be removed from the register of conscientious objectors and that he should be registered as a person liable under the Act to be called up for service, but to be employed only in non-combatant duties. The respondent appealed against this order, but on January 20, 1941, the appellate tribunal dismissed his appeal. On August 15, 1941, pursuant to s. 6 of the National Service Act, 1941, the respondent's name was restored to the register of conscientious objectors as that of a person liable to be called up for service but to be employed only in non-combatant duties.

At a court of summary jurisdiction, sitting at Norwich on October 3, 1941, the respondent was charged under s. 3, sub-s. 4, of the National Service (Armed Forces) Act, 1939, with having at Norwich on April 21, 1941, failed to comply with the requirements of a written notice in the prescribed form duly served on him requiring him to submit himself to medical examination by a medical board at Martineau Hall, Colegate, Norwich. To this information the respondent pleaded guilty, and the court, acting under s. 4, sub-s. 1, of the National Service Act, 1941, ordered him to submit himself to medical examination at such time and place as might be fixed by a notice served on him by the Minister of Labour and National Service and directed the police to convey him for attendance at such medical examination. At 2.30 P.M. on October 3, 1941, in accordance with a written notice served on behalf of the Minister of Labour and National Service on the respondent and the order made by the justices the respondent was taken by a constable to a medical board at Martineau Hall, Colegate, Norwich, for examination, but he again refused to submit himself for examination. When the information under s. 4, sub-s. 2, of the National Service Act, 1941, was heard on the following day, the respondent consented to be dealt with summarily and pleaded guilty. The justices, with one dissentient, expressed the opinion that the respondent was a man of good character and antecedents who had refused to submit to medical examination because of his conscientious objection to service in His Majesty's forces in any capacity, non-combatant or otherwise, and that a conviction would not deter him from repeating the offence but would merely prevent him from doing the work he was willing to do. They decided that, in the proper exercise of their jurisdiction, they ought not to convict him and that it was expedient to release him on probation. They, accordingly, ordered that the respondent be discharged conditionally on his entering into a recognizance in the sum of 5*l.*, subject to the conditions that he be of good behaviour, and that he seek ambulance or similar work under the Society of Friends or the Peace Pledge Union or agricultural work.

The justices, however, agreed to state a case, the question for the determination of the court being whether they were entitled to discharge the respondent conditionally and to impose the said conditions under the Probation of Offenders Act, 1907, without proceeding to conviction.

Sir William Jowitt S.-G., and *Arthian Davies* for the appellant. Where a person deliberately refuses to perform his obligations under the National Service Acts, the procedure under the Probation of Offenders Act, 1907, is inapplicable, and to use that procedure is a wrongful exercise of the discretion of the justices, which the court will correct : *Oaten* v. *Auty* (1). The procedure under the Probation of Offenders Act, 1907, must never be applied where there is contumacy on the part of the defendant or the offence is not trifling : *Phillips* v. *Evans* (2) ; *White* v. *Hurrell's Stores, Ld.* (3) ; *Thomas* v. *Hughes* (4) Although, by s. 5, sub-s. 4, of the National Service (Armed Forces) Act, 1939, the decision of the appellate tribunal on the issue of liability of a person to be called up for service is final, and, by sub-s. 12, no determination of a local or appellate tribunal is to be called in question in any court of law, the justices have taken on themselves the functions and discretion of the tribunal, and have adopted a course which enables the respondent to persist in his contumacy and, indeed, encourages him to do so.

Lloyd-Jones for the respondent. The justices, being satisfied that the respondent was a man of good character and antecedents, were entitled to exercise their discretion and proceed under the Probation of Offenders Act, 1907. If they were not justified in imposing the second condition, that fact does not vitiate the order made under the Act of 1907, and the court can amend the order by striking out the condition. *Oaten* v. *Auty* (5) is distinguishable, for as A. T. Lawrence J. there said : "Not one of the conditions mentioned in s. 1 of "that Act was satisfied in this case."

Davies replied.

Cur. adv. vult.

1942. Feb. 3. HUMPHREYS J. In my opinion, the majority of the justices completely misinterpreted their powers and duties in the matter of the charge on which they were adjudicating, with the result that they acted in excess of jurisdiction and contrary to law, and that is clearly shown by

(1) [1919] 2 K. B. 278.
(2) [1896] 1 Q. B. 305.
(3) (1941) 164 L. T. 334.
(4) [1929] 1 K. B. 226.
(5) [1919] 2 K. B. 278, 286–7.

their "opinion." It was not part of their duty to decide whether and to what extent the respondent was a conscientious objector. That task is reserved by the Act to the local and appellate tribunals, and the opinion expressed by the majority of the bench is in direct contradiction of the findings of those two tribunals. Moreover, it is to be observed that even if the respondent had been placed in category (*b*) of sub-s. 6 of s. 5 of the principal Act, as the justices appear to have thought he ought to have been, it would have been for the tribunal to direct the work of a civil character to be undertaken by him while the condition imposed by the justices leaves to the respondent himself the choice of work which he is to seek, but which apparently he is not required to undertake. Mr. Lloyd-Jones, who appeared for the respondent, admitted that the imposition of this condition could not be supported, but he contended that the fact that the respondent was shown to be a person of good character hitherto was sufficient to justify a court of summary jurisdiction in dealing with the case under the Probation of Offenders Act, 1907, irrespective of the nature of the offence or the circumstances of its commission. In my judgment, no support for that proposition is to be found in the language of the statute or in the decisions of the judges.

It is unnecessary to refer in detail to the provisions of the Probation of Offenders Act, 1907, but the effect of the statute, as amended by s. 8 of the Criminal Justice Administration Act, 1914, may, I think, be summarized as follows. The court of summary jurisdiction before proceeding to apply the terms of the statute to any case is to have regard to the individual before it, his age, character, antecedents and health, to the nature of the offence, whether of a grave or trivial character; and to the circumstances in which the offence was committed; and is then to decide whether it is expedient to deal with the case in one of the ways indicated by the statute, remembering that one of the objects to be sought is the prevention of any repetition of the same or the commission of any other offence. In this case the justices had before them a person who was confessing for the second time in two days to a deliberate refusal to obey the law and, in effect, announcing his intention to continue in that disobedience. The offence consisted in the failure to obey an order of the court itself, an offence regarded by the legislature as of so grave a character as to merit a maximum penalty on summary conviction of imprisonment for twelve months in addition to a fine of 50*l.* To such a case, in my opinion, the Probation of Offenders Act, 1907, has no application. Indeed, I doubt whether the Act can properly be applied to any case of a deliberate refusal to obey the provisions of the National Service Acts, and I am clearly of opinion that it would be wrong for a court of summary jurisdiction not to convict any person proved to have been guilty of an offence against s. 4, sub-s. 2, of the National Service Act, 1941. That offence can only be committed by a person who has already been found guilty of a similar offence and who being given an opportunity by the court of purging his offence has deliberately persisted in his defiance of the law. The Probation of Offenders Act, 1907, is a valuable and useful piece of legislation. The discretion vested in courts of summary jurisdiction is a wide one and this court will not interfere with the lawful exercise of that discretion, but the Act is not to be used as a means of evading the law or of encouraging persistent offenders in their contumacy.

We have been referred to some authorities. In *Phillips* v. *Evans* (1), the respondent, the owner of a dog, had been refused by the Commissioners of Inland Revenue a certificate of exemption. He refused, however, to take out a licence. On the hearing of an information charging him with keeping a dog without a licence the justices heard evidence tendered to show that the respondent ought to have been granted a certificate of exemption, and, accepting that evidence while finding the offence proved, held that the offence was of a trifling nature and dismissed the information under s. 16 of the Summary Jurisdiction Act, 1879, the terms of which are similar to those of the Probation Act, 1907. This court, on a case stated, reversed the decision of the justices, holding that a refusal to take out a licence required by law cannot be

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(1) [1896] 1 Q. B. 305.

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a trifling offence. In *White* v. *Hurrell's Stores, Ld.* (1) this court remitted to justices with a direction to convict a case in which it appeared that the justices had dismissed under the Probation of Offenders Act, 1907, an information against the owners of a large stores for having committed a breach of the Rationing Order in selling bacon without receiving the appropriate coupon. The decision proceeded on the ground that a deliberate evasion of the food regulations in time of war could not be properly described as a trivial offence, that being the ground on which the justices had purported to act. *Oaten* v. *Auty* (2) was a case which arose during the last war, the facts of which are not unlike the present. The appellant was charged under the Military Service Acts then in force with failing to appear when called out for military duty. He claimed to be exempt as being a regular minister of a religious denomination. The justices overruled that contention, but, being of opinion that it was inexpedient to inflict any punishment, they dismissed the information under the Probation of Offenders Act, 1907. The decision of this court turned on a different point, but every member of the court of five judges expressed the view that the Probation of Offenders Act, 1907, had no application to such a case. Bray J. (3) observed: "Part of the "difficulty here is due to the fact that the justices have come "to the absurd conclusion that the offence was proved but "did not deserve punishment. When the offence proved is "failure to perform military service, the justices never should "act under the Probation of Offenders Act, 1907." A. T. Lawrence J. said (4): "The truth is . . . . that this was not a "case for the application of the Probation of Offenders Act," and later "If they"—that is, the justices—"thought he was "subject to the Military Service Acts they should have con-"victed him, and they were wrong in trying to escape from "this by applying the Probation of Offenders Act, 1907." Avory J. was most emphatic in his judgment on this point. He said: "The order made under the Probation of Offenders "Act, 1907, was erroneous in point of law or in excess of

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(1) (1941) 164 L. T. 334.

(2) [1919] 2 K. B. 278.

(3) [1919] 2 K. B. 278, 285.

(4) Ibid. 286–7.

"jurisdiction in the sense that the case was one to which it "was erroneous to apply that Act." After referring to *Phillips* v. *Evans* (1) the learned judge continued: "It is impossible "for anyone to suppose that the offence of being an absentee "or a deserter from the Army is an offence of a trivial nature "which can be dealt with under the Probation of Offenders "Act, 1907." (2). Those observations confirm and strengthen the view which I have expressed.

In my opinion, this appeal should be allowed and the case should be remitted to the justices with a direction to convict the respondent. The amount of the penalty to be imposed is, of course, for the justices to determine.

WROTTESLEY J. I am so entirely in agreement with the judgment which has been just delivered that I find it unnecessary to deliver the judgment which I had prepared. I have only two observations to make. The first is that the justices here appear to have thought that they were dealing with a man of good character or good antecedents within the meaning of the Probation of Offenders Act, 1907. In relation to the Acts under which the respondent was charged he had neither a good character nor good antecedents. He was what is known as a conscientious objector and he took full advantage of the provisions of the Act and the regulations which have been passed for the benefit and protection of such persons, but when it came to his complying with the obligations laid on him by that legislation he preferred to defy the law. He is, therefore, no more a person of good character in this context than is a person who persistently exceeds the speed limit a person of good character when he is charged with an offence under the Acts dealing with the driving of motor cars on the highway. The other observation I wish to make is that, as my Lord has pointed out, it is manifest from a study of the Act and from the authorities that the object and scope of the Probation of Offenders Act, 1907, is not to comfort and encourage those who defy the law. On the contrary, it is there to comfort and encourage those who, it is thought, are going to obey the law. That appears to me to be quite clear from the Act and from the cases cited by my Lord, and particularly from the opinions delivered in *Oaten* v. *Auty* (1). Those opinions were obiter, but for my part I think they ought now to become a ground for decision in these cases.

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(1) [1896] 1 Q. B. 305.

(2) [1919] 2 K. B. 278, 287–8.

CROOM-JOHNSON J. I have had the opportunity of reading the judgment delivered by my brother Humphreys and the reasons given for it, and I agree with it entirely. One of the objects which has to be borne in mind when considering what additional conditions, if any, are to be inserted in a recognizance under the Probation of Offenders Act, 1907, s. 2, sub-s. 2, as amended by the Criminal Justice Administration Act, 1914, s. 8, is the prevention of a repetition of the same offence or the commission of other offences by the person to be bound over. That object seems in this case to have been ignored. The justices have imposed conditions the result of which, if observed, would be to ensure or cause a repetition of the same offence for which the respondent, but for the probation order, must have been convicted, and would be enabling, if not actually encouraging, him to set the law at defiance.

Case remitted to justices with direction to convict.

Solicitor for appellant: *Solicitor to Ministry of Labour and National Service.*

Solicitors for respondent: *Bailey & Freeman, Lowestoft.*

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(1) [1919] 2 K. B. 278.

In re AMAND (No. 2).

1942
Jan. 19, 20, 21, 22, 23, 26, 27, 30.

Conflict of laws—Territory of allied foreign power occupied by enemy—Queen of Netherlands and her ministers in United Kingdom—Dutch States-General and Council of State in territory occupied by enemy—Recognition by His Majesty's government of Queen of the Netherlands and her ministers as competent to carry out functions appertaining to government of Netherlands—Dutch royal decree—

Competency of English court to inquire into validity—Conscription of Netherlands subject living in United Kingdom—Arrest as absentee—Allied Forces Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 1 —*Allied Forces* (*Application of* 23 *Geo.* 5, *c.* 6) (*No.* 1) *Order,* 1940 *St. R. & O.,* 1940, *No.* 1818).

The German invasion of the Netherlands in May, 1940, resulted in the transfer of the Queen of the Netherlands and her ministers to the United Kingdom, but both Houses of the Dutch States-General and the Council of State remained in the Netherlands on territory occupied by and in the power of Germany, the enemy of both the United Kingdom and of the Netherlands. On August 8, 1940, a decree was made by the Queen of the Netherlands on the presentation of the Dutch Minister of Defence and signed by the Minister of Justice, imposing compulsory military service on all Dutch subjects of a certain age residing in (inter alia) the United Kingdom.

In accordance with the terms of that decree, the applicant, who had lived in the United Kingdom for many years, was called upon to report for military service at a place in the United Kingdom, and he did so under protest. In February, 1941, he was given a week's leave, but he did not return at its expiration, and he was subsequently arrested by the Metropolitan police under the powers conferred by the Allied Forces Act, 1940, and an Order in Council made under that Act, as being a deserter from the Netherlands army. Upon the hearing of an application by the applicant for habeas corpus the court was informed by the Attorney-General that the government of the Netherlands was a government for the time being allied with His Majesty and established in the United Kingdom; that it was exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's government in the United Kingdom, and that His Majesty's government recognized Queen Wilhelmina and her government as the sovereign and government of the Netherlands, and competent to carry out the legislative, administrative and other functions appertaining to the sovereign and government of the Netherlands. It was sought by the applicant to challenge the validity, according to Dutch law, of the decree made by the Queen of the Netherlands on August 8, 1940. It was contended on behalf of the Netherlands government that inasmuch as the decree was made by the Queen of the Netherlands who with the government had been recognized by His Majesty's government as the sovereign and government of the Netherlands and competent to carry out the legislative, administrative and other functions appertaining to the sovereign and government of the Netherlands it was not open to the courts of this country to investigate the validity of the decree:—

Held, that although it was well settled that the courts of this country cannot question the validity of the acts of an independent sovereign in relation to property and persons within its jurisdiction, yet in the absence of authority that that principle applies to the acts of an independent sovereign, temporarily resident in this country, affecting the personal freedom of a national of that sovereign government resident in this country, it was open to the courts of this country to investigate the validity of the decree, according to the law of the Netherlands, more especially as the Netherlands courts, which were the only other courts which could investigate the validity of the decree, were no longer functioning.

APPLICATION for a writ of habeas corpus.

The applicant, Jean Jacques Amand, a subject of the Netherlands, had lived in this country for over thirteen years with the permission of the Home Office: and had been arrested as an absentee from the Netherlands Army in the circumstances summarized in the headnote. He unsuccessfully applied for a writ of habeas corpus in March, 1941, to a Divisional Court and an appeal from the decision of that court was dismissed by the Court of Appeal. The facts are set out in detail in the report of the proceedings on the first application to the Divisional Court (1), and for the purpose of this report need not be repeated, as the only new fact was that the applicant had obtained further evidence from Dutch lawyers as to the validity of the decree made by the Queen of the Netherlands on April 8, 1940. On this fresh evidence the applicant again sought to impeach the validity of the decree according to Netherlands law, and the objection was then raised on behalf of the Dutch Minister of Defence and supported by the Attorney-General, that as the decree was the decree of a government, which was admitted by the British government to be in the fullest sense sovereign, dealing with its own national, it was not open to the courts of this country to inquire into the validity of that decree. The present case is reported on this point only, which was not raised in the former application for habeas corpus.

Pritt K.C., *G. O. Slade* and *Victor Wolff* for the applicant.

Le Quesne K.C. and *G. B. McClure* for the Dutch Minister of Defence.

Sir D. B. Somervell A.-G. and *H. L. Parker* for the Crown.

Cur. adv. vult.

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(1) [1941] 2 K. B. 239.

1942. Jan. 30. The following judgments were read.

WROTTESLEY J. [after stating the facts and dealing with the applicant's contention that the Dutch Royal decree and the summons issued under it were not valid by English law, continued :] In the result, therefore, I find that the Royal decree and the summons issued under it were not invalid by English law in the circumstances in which both were issued, and that, in view of what followed, namely, the Allied Forces Act, 1940, and the Order in Council of October 11, 1940 (St. R. & O., 1940, No. 1818), they justified, so far as English law is concerned, the apprehension and detention of the applicant on March 14, 1941.

The decree and the summons are, however, challenged on another ground, namely, that they were invalid under Dutch law, and that, therefore, the power exercised by the Netherlands government was not one conferred by " the law of that "power " and so the Allied Forces Act, 1940, does not apply. To decide this question it is necessary for us to hear evidence as to the law of the Netherlands touching this matter, and at this point we are met by the contentions of the respondents that, as we have the decree of a government admitted by our own government in the fullest sense to be sovereign, dealing with its own nationals, it is not for the courts of this country to listen to arguments impugning its validity. In *Luther* v. *James Sagor & Co.* (1), I find Roche J. saying : " If a foreign "government is recognized by the government of this country "the courts of this country may and must recognize the "sovereignty of that foreign government and the validity "of its acts." The same case was considered by the Court of Appeal (2), further facts having come to light. Warrington L.J. (3) laid it down as well settled that " the "validity of the acts of an independent sovereign government "in relation to property and persons within its jurisdiction "cannot be questioned in the courts of this country," and he quoted with approval Clarke J., when, in delivering the

(1) [1921] 1 K. B. 456, 474.

(2) [1921] 3 K. B. 532.

(3) Ibid. 548.

judgment of the Supreme Court of the United States of America in *Oetjen* v. *Central Leather Co.* (1) he said: "Every "sovereign state is bound to respect the independence of every "other sovereign state, and the courts of one country will "not sit in judgment on the acts of the government of another "done within its own territory." In *Princess Paley Olga* v. *Weisz* (2), Scrutton L.J. said: "Our courts are bound to "give effect to the laws and acts of that government so far "as they relate to property within that jurisdiction when it "was affected by those laws and acts."

It will be observed that none of the above propositions go so far as to cover precisely the facts of this case unless the phrase "persons within its jurisdiction," used by Warrington L.J. would include the applicant here as a person within the jurisdiction of the Dutch courts. I do not think Warrington L.J. can have intended to cover such a case for the simple reason that he had not such a case in his contemplation. We are, therefore, thrown back on the reason for the rule, to ascertain whether it should extend to this case. The question is not without difficulty, but I have come to the conclusion that we ought not so to extend it. The rule which prevents a court from pronouncing to be invalid some act which may nevertheless be invalid by the law of the State which made it is justified on many grounds, but principally on the great advantage which flows from the recognition on the part of every civilized State of the rights of every other civilized State to deal with persons and property inside its own territory. That reasoning clearly does not apply to an act of a foreign country which deals with the personal freedom of a person living in this country within the protection of the Crown, for here the tendency has been for the protecting power to maintain its own independence. The facts here are peculiar, for we have to deal with a decree which brings into play an Act of Parliament affecting the most important of the personal rights of a resident foreigner. If the court is not to enter into this inquiry there is no court to which the applicant can resort, for the only other courts which could

(1) (1917) 246 U. S. 297, 303. (2) [1929] 1 K. B. 718, 725.

investigate the validity of the decree, those of the Netherlands, are admittedly no longer in existence, or rather are in abeyance. Some support for entering on the inquiry may perhaps also be derived from the fact that in s. 1, sub-s. 1, of the Allied Forces Act, 1940, Parliament enables foreign countries allied with His Majesty to exercise here " all such "powers as are conferred upon them by the law of that "power."

In all the circumstances I have come to the conclusion that we ought to enter on this inquiry and ascertain whether, under the law of the Netherlands, this decree and the summons issued under it are valid. [The learned judge then considered the evidence of the validity of the Dutch decree and finally said :] Accordingly I find that the Royal decree under debate is by Dutch law valid and effective. By it and the summons the applicant became a member of the Dutch forces as between himself and the Dutch government, and by the Order in Council the applicant became liable to powers put in force under s. 154 of the Army Act. In my view, the application must be dismissed.

CROOM-JOHNSON J. [after stating the facts :] It was sought to challenge the power of the Netherlands government to make the decree and on that and other grounds to challenge its validity in Netherlands law as being unconstitutional. It was submitted by counsel for the Dutch government that our law does not permit the challenge of invalidity to be made. The argument on this point was as follows. If the Netherlands government, at the time of making the decree of August 8, 1940, had had its seat of government in its own territory, it being manifestly an independent sovereign State, the courts of this country might and must recognize the sovereignty of that foreign government and the validity of the legislative and other acts of State : *Luther* v. *James Sagor & Co.* (1). The courts of this country will not sit in judgment on the acts of the government of another country done within its own territory :

(1) [1921] 1 K. B. 456, 473, 474 ; C. A. [1921] 3 K. B. 532.

Princess Paley Olga v. *Weisz* (1); *Oetjen* v. *Central Leather Co.* (2). In *Luther* v. *James Sagor & Co.* (3), Warrington L.J. stated the proposition thus (4): "It is well settled that the "validity of the acts of an independent sovereign government "in relation to property and persons within its jurisdiction "cannot be questioned in the courts of this country." The words "within its jurisdiction" raise the difficulty. In *Luther* v. *James Sagor & Co.* (3), evidence was admitted to prove what the law was, but not, I gather, to question the power of the Russian government to make it. The power of the foreign government to make laws relating to movable property not its own and not within its own territory (or jurisdiction in that sense) is not here in question; see *The Jupiter* (*No.* 3) (5). As to its nationals resident in another country, it was argued that the government of an independent sovereign State may legislate for them (see Dicey on Conflict of Laws, 5th ed., p. 20; Oppenheim's International Law, vol. i., 5th ed., p. 507; but compare Wheaton on International Law, 6th ed., vol. i., pp. 205, 206), but cannot enforce such legislation except in its own territory. There is nothing in Netherlands law to prevent the government from passing legislation binding on Netherlands subjects who are residing outside the Netherlands, but this court would have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or political law of a foreign state: Dicey on Conflict of Laws, 5th ed., p. 212. A Netherlands subject abroad comes within the jurisdiction of the Netherlands government when its seat of government lies within its territory and on his return to his native country it would be no answer, if the government then sought to enforce the law against him, to say that he was abroad when the law was passed. The seat of the Netherlands government, however, in the circumstances of the times has ceased to be in its own territory, but that makes no difference. "The proper source of information as to a foreign power,

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(1) [1929] 1 K. B. 718, 725, 728.

(2) 246 U. S. 297, 303.

(3) [1921] 1 K. B. 456, 473, 474; C. A. [1921] 3 K. B. 532.

(4) [1921] 3 K. B. 548.

(5) [1927] P. 122; in C. A. 250.

"its status and sovereignty, is the sovereign of this country "through the government": per Roche J. in *Luther* v. *James Sagor & Co.* (1). In this case the Attorney-General, as representing the government, has made a statement at the bar by which the court is informed that the government of this country still recognizes the Netherlands government as that of an independent sovereign state. That recognition is, apparently, effective as from the date of the establishment of the Netherlands government in this country, per Bankes L.J. in *Luther* v. *James Sagor & Co.* (2), citing *Williams* v. *Bruffy* (3). The decree has been proved to be an act of state of the Netherlands government here and so recognized by our government.

The difficulty which I feel in the matter (a difficulty which I understand is shared by each of my brethren) is that there is no reported decision in English law which supports the proposition submitted, which was that for the purpose of the rule a Netherlands subject here was within the jurisdiction of the Netherlands government when that government was no longer in the Netherlands or its territory. This case, after all, deals pointedly with the liberty of an individual residing here under the protection of the King's peace and at a time when manifestly the ordinary Netherlands courts are not available to him. It may very well be that to examine into the validity of the decree would seem to deny the sovereign independence of this particular state, to be a breach of the comity of nations, and deny full force to our government's statement, and that the principle enunciated in the decided cases is wide enough to cover this case. I am attracted by those arguments and I have been inclined in principle to accept them, but on the whole, in the absence of express authority going so far, I am not prepared to hold that this court ought not to inquire and cannot inquire into the power of the Netherlands government here to make the decree in question or to examine its validity in Netherlands law when made.

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(1) [1921] 1 K. B. 473.
(2) [1921] 3 K. B. 542.
(3) (1877) 96 U. S. 176, 186.

Assuming, therefore, that we may or must examine the competence or ability of the Netherlands government here to make the decree and its validity when made, I have considered, I hope with a completely independent mind, all the evidence and documents laid before us as to what in fact is the Netherlands law in all its detail and all the arguments adduced. [His Lordship, having discussed the evidence on both points and his conclusions, said :] I find that there was power in this Netherlands government to make the decree and that it is valid according to the Netherlands law. [His Lordship then dealt with the question whether the decree was valid by English law, and continued :] In the result, in my judgment, the applicant was at the material date, March 14, 1941, in Netherlands law and in English law a member of the Netherlands forces lawfully in this country. He was absent without leave, and, as such, as a matter of English law, was subject to the provisions of the statute of 1940 and to s. 154 of the Army Act as applied. It follows that his arrest and detention were not unlawful and the application must be dismissed.

CASSELS J. It is contended on behalf of the applicant that, while he is living under the protection of the British government, he cannot be affected by the legislation, assuming it to be such, of the Queen and the government of his own country. It is said that the decree of August 8, 1940, in accordance with which he was served with notice calling him up to the Dutch army here, was invalid according to Dutch law and unlawful according to English law. Can the validity of that decree be inquired into in our courts ? Mr. Pritt asserts that it can. Mr. Le Quesne says that it cannot, and the Attorney-General submits that we can listen to argument as to what the decree means, but that when once it is accepted that this decree emanates from the Queen of the Netherlands, who, with her government, is recognized as the sovereign government, we cannot listen to argument whether or not it is valid.

It is well settled that the courts of this country cannot question the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction: *Luther* v. *James Sagor & Co.* (1). Does the same principle apply when the act, the validity of which is questioned, is the act of a sovereign government sojourning temporarily by reason of emergency in this country and recognized as the legislative authority by the government of this country? Does the same principle apply when that act affects a national of that sovereign government resident in this country under the protection of the government of this country and its laws? On this point there seems to be no authority. I agree with both my brethren. I am impressed by the fact that the Netherlands courts no longer function. The applicant cannot apply for redress in his own courts. I know that the principle "rests at last upon the "highest considerations of international comity and ex-"pediency," but I think it would be wrong to say of our courts of law that on such a question as this and at such a time they are closed to the nationals of a foreign sovereign temporarily resident in this country and recognized for legislative purposes by our government. The circumstances under review are exceptional. I agree that we ought to go into this matter. After due consideration I hold that this decree was valid.

[His Lordship, after reviewing the evidence, held that the decree was valid by Netherlands law, and held further that it was valid by English law and the applicant was lawfully detained.]

Application refused.

Solicitors for the applicant: *Gisborne & Co.*

Solicitors for the Dutch Minister of Defence: *Stephenson, Harwood & Tatham.*

Solicitor for the Crown: *Treasury Solicitor.*

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(1) [1921] 1 K. B. 456; C. A. [1921] 3 K. B. 532.

R. F. S.

REDPATH, BROWN AND COMPANY, LIMITED v. HAYES.

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Feb. 10, 11.

Workmen's compensation—Review of weekly payments—Workman's refusal to undergo operation—Reasonableness—Amputation of foot—Opposing views of surgeons as to advisability—Provision of artificial foot—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 1.

A workman in the course of his employment suffered serious injury to one of his feet, and received compensation at the rate of 30*s.* a week. He recovered from his injury to some extent, but he continued to suffer much pain and disability. He was examined by an eminent surgeon, who advised amputation of the foot, but he refused to undergo the operation although the surgeon advised him to do so on several occasions. The employers applied, under s. 11 of the Workmen's Compensation Act, 1925, for arbitration with a view to the review and termination or diminution of the weekly sums being paid to the workman. The workman consulted another eminent surgeon, who advised him not to undergo amputation for the present. At the hearing in the county court, the question of providing an artificial foot for the workman in the event of his undergoing the operation was not considered. The county court judge held that the workman's refusal to undergo the operation was unreasonable, and he ordered the reduction of the compensation to 20*s.* a week :—

Held, by the Court of Appeal, that, in the absence of adequate assurance by the employers that the workman would be provided with an artificial foot for the rest of his life, it could not be said that the workman had acted unreasonably in refusing to undergo the operation, and, further, that the true question was not whether the operation was reasonable and likely to succeed, but whether the workman's refusal to undergo it was unreasonable, and that, he having received opposite opinions from two eminent surgeons, it could not be said that he was unreasonable because he chose to follow one opinion rather than the other; that there was no evidence on which the county court judge could hold that the workman's refusal was unreasonable; and that the decision of the county court judge could not therefore stand.

APPEAL from His Honour Judge Richardson, at Newcastle-on-Tyne county court.

The workman, James Hayes, was employed by Redpath, Brown & Co., Ld. On January 5, 1938, in the course of his employment, he suffered a serious injury to one of his feet, and received weekly compensation at the rate of 30*s.*

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

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a week. The foot was crushed so badly that a large part of the bone-work of the foot had to be removed, and at the date of the hearing in October, 1941, he was still suffering considerable pain, which, however, he thought, would get "dimmer," as he put it. He could walk two miles slowly with a stick. His foot was, therefore, of some practical use in the sense that he could walk with a stick, he could stand, and he did not have to use crutches. On February 3, 1939, he was examined by Mr. Gordon Irwin, an eminent surgeon practising at Newcastle, who said, in his evidence, that on that occasion he expressed the opinion that the foot ought to have been removed and suggested to the workman that he should have further treatment. He saw him again in May, 1939, when he found no material change, and suggested that it would be wise to have the foot removed, but the workman would not have it amputated. On January 31, 1940, Mr. Irwin found the conditions exactly the same. He expressed the opinion that the only thing to do was to remove the foot, and the workman was apparently undecided what to do. Mr. Irwin saw him again on April 28, 1941, when he tried to persuade him to undergo the operation. He then said that, if the foot were removed the workman would be able to walk for miles, that modern artificial limbs were good, and he would be able to do practically anything, but that, as it was, there was no chance of improvement and his condition was stationary. On July 10, 1941, the employers made a request for arbitration under s. 11 of the Workmen's Compensation Act, 1925, with a view to the review and termination or diminution of the weekly payments which were being made to the workman, the ground being his refusal to undergo a surgical operation of a reasonable nature. On September 23, 1941, the workman consulted another eminent surgeon practising at Newcastle, Mr. John Gilmore, whose evidence was that the foot was fixed, with little movement. He agreed with Mr. Irwin's descriptions, but he said that, unless the foot deteriorated, it would be high-handed to insist on amputating it. He thought that progress might continue, but he did not think that the man could improve very much.

He did not advise him to have the foot off as he was not totally incapacitated at the time and could do sedentary work, but he agreed that, if he had the amputation, he would be more efficient and could get about better and do bench work or attend machines. On that evidence and that of the workman himself, who stated that he was not willing to have the foot removed, the judge came to the conclusion that the workman was acting unreasonably in refusing to have the operation, and ordered the rate of compensation to be reduced to 20*s*. a week.

The workman appealed.

Paull K.C. and *Edgedale* for the workman. In view of the fact that the surgeon consulted by the workman advised against the operation the workman cannot be said to have acted unreasonably in refusing to undergo it, although the employers' surgeon advised that it should be performed. The foundation of the principle is laid down in *Donnelly* v. *Baird & Co., Ld.* (1), where Lord M'Laren said: "The statutory "obligation of the employer to give maintenance during "the period of incapacity resulting from an accident is subject "to the implied condition that the workman shall avail himself "of such reasonable remedial measures as are within his "power," but in that case there was no difference of opinion among the doctors. In no authority has it been held unreasonable for a man to refuse to undergo a major operation when his doctor has advised against it: see *Earl Fitzwilliam Collieries* v. *Crossley* (2); *Tutton* v. *Owners of S.S. Majestic* (3); *Warncken* v. *R. Moreland & Son, Ld.* (4); *Gracie* v. *Clyde Spinning Co., Ld.* (5); *Cant* v. *Fife Coal Co., Ld.* (6); *Fyfe* v. *Fife Coal Co., Ld.* (7). The inference to be drawn from the authorities is that special circumstances have to be shown before a workman can be held to be unreasonable when he follows the advice of his own doctor whom he believes to be competent, and those special circumstances cannot exist when one doctor

(1) 1908 S. C. 536, 541.
(2) (1925) 18 B. W. C. C. 109.
(3) [1909] 2 K. B. 54.
(4) [1909] 1 K. B. 184.
(5) 1915 S. C. 906.
(6) 1921 S. C. (H. L.) 15.
(7) 1927 S. C. (H. L.) 103.

is in favour of an operation and another of equal eminence is against it. In such a case there is no evidence that the man acted unreasonably. In none of the authorities had a major operation been contemplated. In *O'Neill* v. *John Brown & Co., Ld.* (1) the operation was simple and could do no harm, and, moreover, it was advised by three medical men. That was very different from the removal of a foot, involving permanent mutilation when only one doctor has advised it. Certain propositions can be deduced and should be considered by arbitrators in these cases. They are as follows. Before the novus actus interveniens arises there must be evidence showing that the workman has an unreasonable mind in refusing to undergo the operation. That is the true basis, not whether the operation is reasonable. The fact that the arbitrator is of opinion that one doctor's view as to the advisability of the operation is to be preferred to that of another doctor is no evidence of itself of unreasonableness on the part of the workman if he refuses to undergo the operation. The fact that the workman's doctor has advised against the operation is conclusive evidence against the workman's refusal being unreasonable, unless there are circumstances which show that no reasonable man would in fact follow that advice. The fact that the employers' doctor has advised the operation, and the operation is considered reasonable, is by itself no evidence of unreasonableness on the part of the workman if he refuses to undergo the operation. To succeed in such a case as the present an employer must show that the incapacity of the workman is no longer due to the accident but is due to the workman's unreasonable conduct, and the onus of showing the break in the chain of causation is on the employer: *Marshall* v. *Orient Steam Navigation Co., Ld.* (2); *Earl Fitzwilliam Collieries* v. *Crossley* (3). The employers here have not discharged the burden which is on them. The county court judge should have made it clear at what time he considered the conduct of the workman to be unreasonable, but he did not do so.

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(1) 1913 S. C. 653.
(2) [1910] 1 K. B. 79.
(3) 18 B. W. C. C. 109.

Sellers K.C. and *W. H. Duckworth* for the employers. The question whether the workman's refusal in such a case as this is reasonable or unreasonable is one of fact for the county court judge, and the only question for the Court of Appeal is whether or not there was any evidence on which the county court judge could come to the conclusion to which he did: *Fyfe* v. *Fife Coal Co., Ld.* (1). In the present case the workman's mind was not really influenced by the medical opinions. He formed the opinion himself that the operation would not benefit him. Moreover, the doctor whom the workman consulted merely expressed the opinion that he would not advise amputation at the moment. The workman's case is bad on the facts, and it is not supported by the authorities: *Fyfe* v. *Fife Coal Co., Ld.* (1); *Purvis* v. *Goole Steam Shipping* (2). It cannot be said that there was no evidence of refusal by the workman to undergo the operation, or that the refusal was unreasonable. The compensation payable to the workman could have been terminated as from the date of the hearing of the arbitration: *Earl Fitzwilliam Collieries* v. *Crossley* (3). The award made by the county court judge is, therefore, more favourable to the workman than it need have been.

LORD GREENE M.R. This, so far as counsel has been able to discover, is the first case which has come up for consideration in any court whose judgments are reported where a workman is alleged to have been guilty of unreasonable conduct in refusing to submit to an operation of a particular gravity. The special feature of the case lies in the circumstance that, if the operation were carried out, and the workman's foot were amputated, he would have to be supplied for the rest of his life with an artificial limb.

There is one matter at the outset which seems to me to make it impossible for the county court judge's decision to stand. This was not a case of an operation for the removal of a finger or for hernia or something of that kind, which would not necessitate the workman afterwards using an artificial limb.

(1) 1927 S. C. (H. L.) 103.
(2) (1937) 30 B. W. C. C. 330.
(3) 18 B. W. C. C. 109.

It was a case of a major operation which unquestionably would leave the man worse than he was before unless he was supplied for the rest of his life with an artificial limb, probably with two limbs, because it is notorious that in such circumstances one limb is not enough, but that there must be a change. The question in these cases always is not whether the operation proposed is a reasonable one or is reasonably likely to be successful, but whether the workman is unreasonable in refusing to undergo it. It is, therefore, important to remember that the operation which the workman refused to undergo would deprive him of a foot which at present, at any rate, is of some use to him. Whether or not it might be unreasonable for a man who is advised to have a foot amputated to refuse to undergo the operation when effective provision is made to supply him with the necessary artificial limb is another question, but, in my view, it is not permissible to say that a man who is invited to have his foot amputated and is left with no assurance and no security that he will obtain an artificial limb is acting unreasonably in refusing to undergo the operation. Mr. Sellers said that at the hearing before the county court judge no attention was paid to that matter because it must have been assumed that some provision for the limb would be made either by the employers or by the insurance company, or that the workman would probably be able to get a limb from the hospital or something of that kind. In other words, the workman would be left without a foot. He might or might not get his artificial limb. It might, or might not, be provided, not in pursuance of any legal obligation, by the employers or by their insurance company. Why should the workman be told that he is unreasonable if he does not submit himself to such a state of uncertainty for the rest of his life? The workman is twenty-eight years of age, and, according to the employers' contention, he will lose his compensation unless he submits to the amputation of his foot although in two or five or ten years' time he may have to provide himself with an artificial foot at his own expense. It cannot be too clearly stated that, where the provision of an artificial limb is necessary, that matter must be most strictly attended to.

The county court judge ought himself to have taken notice of it and to have held on the facts before him that the employers had not discharged the burden of proving that the workman's refusal to undergo the operation was unreasonable.

Mr. Paull put before us an interesting argument in which he submitted certain propositions which he said, as a matter of law, should rule the decisions of arbitrators in these cases. I do not find it necessary to examine those submissions. I content myself with saying that, in my opinion, there was no evidence on which the county court judge could find that there was an unreasonable refusal on the part of the workman. It seems to me that in such a case as this unreasonable conduct on the part of the workman can only be held to be established on really strong and exceptional evidence. I find it impossible to say that where two eminent surgeons give diametrically opposite advice to a workman in respect of a major operation of this kind, it can be said that the workman is unreasonable if he follows the advice of one surgeon rather than that of the other. I wish to make it clear that I am dealing with the facts of this case—the evidence which was given, the nature of the accident and the injury, and the operation proposed. What might be the result in some other case is neither here nor there, but on the facts of the present case I have come to the conclusion that there was no evidence on which the county court judge could hold as he did. The result is that I would allow the appeal.

MACKINNON L.J. I agree. I think that it is sufficient to decide this appeal to say that it was alleged that the refusal by the workman to have his foot amputated was unreasonable. But when the facts are examined it appears that the employers can only succeed if they establish that the workman unreasonably refused to accept an offer to have an artificial foot supplied to him for the rest of his life in place of the injured natural foot which he had. There was no evidence before the county court judge that any offer of that sort had ever been made, and, therefore, there could be no evidence that the workman ever refused it, reasonably or otherwise.

In those circumstances it was wrong to diminish the compensation in the way in which it was diminished. This is sufficient to dispose of this case, and I think it is unnecessary and undesirable to consider any of the other possible questions which have been debated before us.

GODDARD L.J. I agree with the judgment of the Master of the Rolls. I think that there was an utter absence of any evidence which would justify the county court judge in holding that there had been an unreasonable refusal by the workman to undergo a surgical operation. In applying for a review, the employers alleged a refusal by the workman to undergo an operation of a reasonable character. I cannot help thinking that throughout the judge's judgment it was to that that he was directing his mind, and it is wrong. No doubt, it has to be shown in this class of case that the operation is of a reasonable character, because, if it were not, the refusal to undergo it could not be unreasonable, and, if the only question for the county court judge had been whether or not this operation was reasonable, not only was there evidence on which he could find that it was, but I should also find myself in agreement with him. It is, however, one thing to say that an operation is reasonable, and quite another to say that a man is acting unreasonably in refusing to undergo it.

As my Lord has pointed out, this is the first case in which any such question as the amputation of a major limb has arisen. An operation for hernia, although it is serious as involving the opening of the abdomen, is very different from an operation which involves the loss of a limb such as a leg, a foot, or an arm. Speaking entirely for myself, I think it requires a much stronger case to justify a finding that a man is unreasonable in refusing to undergo an operation resulting in the loss of a limb which, at any rate, if it remains in the condition in which it is, is some use, than if it is only a matter of removing a finger or a toe or curing a rupture. In this case the employers were advised by a surgeon of eminence that the operation was reasonable, but the workman, in refusing

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to undergo amputation at the moment, is supported by the opinion of Mr. Gilmore, who said that he would not advise it then. In those circumstances, even if both of the surgeons had said: "We think it is a reasonable operation," but one, of the eminence of Mr. Gilmore, had added: "But I "do not advise it at present," how can it be said by any stretch of the imagination that the workman is unreasonable in refusing to undergo it?

In *Cant* v. *Fife Coal Co., Ld.* (1) Lord Atkinson said: "How "a man believing in the doctor he consults, though he may be "a general practitioner, can be said to be guilty of unreasonable "conduct passes my comprehension altogether." How a man who accepts the view of one of the most eminent surgeons in the north of England, or finds his own opinion supported by that view can be said to be guilty of unreasonable conduct certainly passes my comprehension. If the county court judge had applied his mind to the proper question whether the refusal was unreasonable and not to the question, as I think he did in the main, whether the operation was reasonable, I cannot doubt that he would have found there was no evidence on which he could have said that the workman's conduct was unreasonable in any degree.

There is the other point with which both my Lords have dealt with regard to the artificial limb and I agree with all that has been said. It seems to me that, if cases arise in the future where it becomes necessary before compensation can be terminated or before an operation can be envisaged that an artificial limb should be provided, the most careful consideration must be given to what provision is to be made for the workman having the benefit of an artificial limb for the rest of his life, more especially where he is young as in the present case. It certainly is not enough for the insurance company or the employer to say: "We are going to give him an artificial "limb or two artificial limbs." These limbs may meet with accidents. They will wear out if the man lives. If it is necessary that the man should be supplied with an artificial limb, and if it is part of the employers' case that the amputation

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(1) 1921 S. C. (H. L.) 15, 23.

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is desirable because the injured limb can be replaced and the workman's capacity increased by an artificial limb, some security must be provided so that the workman will be able to have the benefit of an artificial limb throughout the term of his life. That is by no means an easy thing to arrange, but it certainly is not enough for an insurance company to offer an artificial limb, and, as my Lord pointed out during the argument (which seems to me, if I may be allowed to say so, an observation to be very much borne in mind), there may come a time when, in spite of his having an artificial limb, it may be found that the man cannot work and then it would be open to the employer to say: "You cannot get along "with an artificial limb. Therefore we will resume paying "you your full compensation and that is the total measure "of our liability." That is no compensation at all to a man for having lost a limb.

There was another point raised which, in view of the decision on these other two points, really becomes immaterial, but I have great difficulty in understanding how the judge came to make the order which he did. As I read his judgment, I think he meant to find that, after hearing the case out in court and the examination and cross-examination of both the surgeons, he thought it would be unreasonable for the workman further to refuse to have the operation. His words were: "If he refuses on the facts of this case he is, in my "opinion, acting unreasonably." He certainly does not say that he finds that the workman was acting unreasonably at an earlier period than at the time when he was actually before him. If he did mean to find that he was acting unreasonably at some earlier time I think the judge should have found at what time the refusal was unreasonable, because the surgeon who advised the operation said that it would be reasonable to allow a further six months after the workman had recovered from the operation, which, I suppose, means the healing of the stump sufficiently for the artificial limb to be fitted. Therefore, it is clear that there might have to be a period of eight months—it might not be so long, or it might be nine or ten months—from the time of the operation before the workman would be regarded as a fit man with the assistance of the artificial limb. The judge, however, did not fix any time as from which the workman's refusal must be regarded as unreasonable. Even if we had upheld the judge's view, I do not think that the order could have stood in the terms in which it is. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for workman: *W. H. Thompson.*
Solicitors for employers: *Carpenters.*

REX *v.* WEYMOUTH LICENSING JUSTICES.

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Feb. 3, 17.

Licensing—Special removal—Old on-licence—Premises rendered unfit for use—Premises to which removal sought in same licensing district already fully served—Removal refused by licensing justices—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 24, *sub-ss.* 2 (*b*), 4.

Licensing justices have no power to refuse an application made under s. 24, sub-s. 2 (*b*), of the Licensing (Consolidation) Act, 1910, for the special removal of an old on-licence (as defined by part I. of sch. II. to the Act) from premises which have been rendered unfit for use by some unforeseen and unavoidable calamity to other premises within the same licensing district except on the grounds specified in para. (B) of part II. of sch. II. to the Act. The power to refuse such a removal on other grounds is vested in the compensation authority on a reference by the justices.

Sect. 24, sub-s. 4, of the Act, which empowers the licensing justices to authorize a special removal to premises which in their opinion are "fit and convenient for the purpose," does not confer on the justices power to refuse a special removal on the ground that the premises are not convenient for the purpose of an on-licence having regard to the fact that, in their opinion, the needs of the locality are already fully served.

MOTION for order of mandamus.

In March, 1941, William Henry Sleep, the holder of an old on-licence for the Cornopean Inn, St. Leonards Road,

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Weymouth, applied at the general annual licensing meeting of the borough for an order under s. 24, sub-s. 2 (*b*), of the Licensing (Consolidation) Act, 1910, authorizing the special removal of the licence to other premises in the same licensing district, known as 16 Newstead Road, on the ground that the licensed premises had been damaged and "rendered "unfit for use" as licensed premises by "unforeseen and "unavoidable calamity," namely, enemy action. The licensing justices refused the application on the ground that "the majority of the bench consider that the needs of the "neighbourhood to which it is proposed to remove the "licence are fully served." The licensee moved for an order of mandamus calling on the justices to hear and determine the application according to law, the ground for the motion being that, having regard to the provisions of s. 27; s. 24, sub-ss. 2 (*b*) and 4; s. 23; and s. 18, sub-ss. 1 and 2, of, and parts I. and II. of sch. II. to the Act of 1910 (1), the power to

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(1) By Licensing (Consolidation) Act, 1910, s. 18, sub-s. 1: "The power to refuse the renewal "of any such justices' on-licence "as is described in the first part "of sch. II. to this Act (in this "Act referred to as an old on-"licence) on any ground other "than any of the grounds specified "in Part II. of that schedule shall "be vested in the compensation "authority and not in the licensing "justices, but shall only be exer-"cised on a reference from those "justices and on payment of "compensation in accordance with "this Act."

Sect. 23, sub-s. 2 (*c*): "The "special provisions of this Act "affecting the renewal of an old "on-licence shall apply to the "transfer of an old on-licence as "they apply to the renewal."

Sect. 24, sub-s. 1: "For the "purposes of this Act, the re-"moval of a justices' licence is "the removal of a justices' licence "from the premises in respect of "which it was granted to other "premises." Sub-sect. 2: "A "removal of a justices' licence "may, subject to the limitations "in this Act, be authorized by "the licensing justices at their "discretion, either on an applica-"tion for the purpose made on "any ground (in this Act referred "to as an ordinary removal), or "on an application made on the "special ground . . . . (*b*) that "the premises in respect of which "the licence has been granted "have been rendered unfit for use "for the business there carried on "under the licence by fire, tem-"pest, or other unforeseen and "unavoidable calamity . . . ." Sub-sect. 4: "A special removal "of a justices' licence may be "authorized to any premises with-"in the same licensing district as "the premises from which it is "desired to remove the licence, "being, in the opinion of the "licensing justices, fit and con-"venient premises for the pur-"pose."

Sect. 27: "The power of the "licensing justices to authorize "the special removal of a justices' "licence shall be subject to the "same provisions and to the same refuse the application on any ground other than those specified in para. (B) of part II. of sch. II. was not vested in the licensing justices. In an affidavit sworn by the chairman of the licensing justices in answer to the motion it was stated (para. 7): "The majority of the justices were of opinion "that, in the case of an application for an order of special "removal, the words contained in s. 24, sub-s. 4, of the said "Act 'being, in the opinion of the licensing justices, fit and "'convenient premises for the purpose' conferred on them "(in addition to their powers of refusal under sch. II.) a "discretionary power to decide whether, in their opinion, the "premises were fit and convenient for the purpose of an on-"licence, and that, in arriving at such opinion, they were entitled "to take into consideration . . . . whether the premises were "fit and convenient for the purpose of an on-licence in "relation to the neighbourhood in which they were situated."

Comyns Carr K.C. and *Curtis-Bennett* for the licensee. The justices had no jurisdiction to refuse a special removal on the ground which they have assigned. By s. 24, sub-s. 2 (*b*), of the Licensing (Consolidation) Act, 1910, the licensing justices may, at their discretion, authorize a special removal of an old on-licence when the premises in respect of which the licence has been granted have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity, provided that the new premises are within the same licensing district and are "fit and convenient for the "purpose": s. 24, sub-s. 4. The justices are not bound to authorize a special removal, but they can only refuse to do so on the grounds specified in sch. II., part II. (B). The power to refuse on any other ground is, by s. 18, sub-s. 1, of the Act,

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"procedure as the power of the "justices to authorize the transfer "of a justices' licence."

Sch. II., part I.: "Description "of old on-licences. Justices' on-"licences which were in force on "August 15, 1904, ... whether "the licence continues to be held "by the same person or has been "or may be transferred to any "other person or persons."

Part II. (B): "In the case of "any old on-licences other than "old beerhouse licences: (1.) the "ground that the licensed premises "have been ill-conducted or are "structurally deficient or struc-"turally unsuitable; (2.) grounds "connected with the character or "fitness of the proposed holder of "the licence; (3.) the ground "that the renewal of the licence "would be void."

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vested in the compensation authority, and is only exercisable on a reference from the licensing justices and on payment of compensation in accordance with the Act. The words "fit "and convenient premises for the purpose" in s. 24, sub-s. 4, refer only to the building and not to the locality to which it is proposed to remove the licence. The justices have found that the premises in question are structurally fit and convenient. [*Boodle* v. *Birmingham Justices* (1) was referred to.]

Montgomery K.C. and *Sidney Lamb* for justices. Sect. 14 of the Alehouse Act, 1828, dealt with both transfers of licences from person to person and grants (often popularly, but incorrectly, called transfers) from premises to other premises. For the meaning of "transfers" see s. 4 of the Act of 1828. That position was preserved in the Licensing Act, 1904, but the draughtsman of the Licensing (Consolidation) Act, 1910, probably having in mind the decision in *Traynor* v. *Jones* (2) and appreciating the difficulty of applying the provisions of sch. II. to the Act to special removals, split up s. 14 of the Act of 1828 and put its provisions into separate sections. Thus s. 23 of the Act of 1910 deals with transfers from one person to another or others, and ss. 24 and 27 with grants, or what are popularly called transfers, from premises to other premises. So far as transfers of ante- 1869 beerhouse licences from one person to another are concerned the grounds of refusal remain as they were in the 1828 Act: see s. 18, sub-s. 1, and sch. II. to the 1910 Act; but s. 24, sub-s. 4, shows a clear intention to give a wider discretion to the licensing justices in authorizing special removals, and it is a reasonable inference that there is included a right to consider whether the proposed new premises are "fit and convenient for the "purpose" of an on-licence in relation to the neighbourhood the needs of which it is to serve. Sub-sect. 4 must not be construed in a narrow sense. The words "in the opinion of "the licensing justices" emphasize that "fit and convenient "for the purpose" is a consideration which must be undertaken by them. The grounds for the refusal of a renewal of an old on-licence specified in part II. of sch. II. to the Act of 1910 are not of such a character as to be applied, and do not apply, to special removals. They are intended to be applied only to a transfer from person to person. If an order of special removal had been granted in the present case it would still be open to the licensing justices at the next or

(1) (1881) 45 J. P. 635.

(2) [1894] 1 Q. B. 83.

a subsequent annual licensing meeting to refuse a renewal of the licence on the ground of redundancy, and the licensee would not be entitled to compensation. Part I. of sch. II. defines an old on-licence as a justices' on-licence which was in force on August 15, 1904, " whether the licence continues "to be held by the same person or has been transferred to "any other person or persons." The case of a licence transferred to fresh premises is not covered by those words, and after special removal the licence would not be an old on-licence.

Carr K.C. in reply. *Traynor* v. *Jones* (1) must be considered in conjunction with *Simonds* v. *Justices of Blackheath* (2), which was there distinguished. The Wine and Beerhouse Act, 1869, contained no provision corresponding to s. 27 of the Act of 1910, which was introduced for the express purpose of dealing with *Traynor* v. *Jones* (1).

Cur. adv. vult.

The following judgments were read.

Feb. 17. HUMPHREYS J. By the combined operation of s. 27, s. 23, sub-s. 2, and s. 18 of the Act, the only relevant grounds on which the justices are entitled to refuse an application for the special removal of an old on-licence are those to be found in part II. of sch. II., i.e., grounds connected with the character of the applicant or the premises, including a ground that the premises are " structurally deficient or structurally "unsuitable." Any other ground of refusal is to be exercised, not by the justices, but by the compensation authority on a reference from the justices and on payment of compensation. The procedure to be adopted in that case is laid down in s. 19, and in rr. 44 and 45 of the Licensing Rules, 1910, made in pursuance of s. 47 of the Act. None of the grounds in part II. of sch. II. applied to this case, and the justices did not adopt, or, as far as we know, consider the procedure above referred to of referring the question of the special removal to the compensation authority.

It is, of course, essential that the licensee should bring himself within the terms of s. 24, which alone gives jurisdiction to the justices to make the order asked for. The application, which was unopposed, was refused by the justices, the ground

(1) [1894] 1 Q. B. 83.

(2) (1886) 17 Q. B. D. 765.

of refusal, which was stated in writing, being "that the needs "of the neighbourhood to which it is proposed to remove the "licence are fully served." The chairman of the justices has made an affidavit setting out the reasons for the refusal, from which it appears that the question for our decision is whether the words "fit and convenient" in s. 24 relate solely to the building, its accommodation and arrangements, or whether they authorize the justices to take into consideration the situation of the premises and their proximity to other licensed houses. There is no special significance to be attached to the presence of those words in s. 24, sub-s. 4. They are taken directly from s. 14 of the Alehouse Act, 1828, which dealt with various matters which are now the subject of different sections in the Act of 1910, and (inter alia) provided for what is in the Act of 1910 termed a "special removal." That section continued in force until repealed, together with the rest of the Alehouse Act, 1828, by the Licensing (Consolidation) Act, 1910. Moreover, the Act of 1910 did not alter the law. It merely re-enacted in a slightly different form the provisions of the Licensing Act, 1904, which introduced the novel principle of compensating licensees and owners of existing licences for the loss occasioned by the refusal of a renewal or transfer on any ground other than one of the special grounds above referred to. Section 9 of that Act defines "transfer" as including a transfer under s. 14 of the Alehouse Act, 1828. The argument on behalf of the justices, therefore, appears to involve the proposition that the framers of the Act of 1904, while clearly depriving justices of the power of refusal on such a ground as failure to prove a need for the new grant, omitted to notice that this ground remained open to them by reason of the terms of s. 14 of the Alehouse Act, 1828, incorporated in the new statute. That is a contention which I find it impossible to accept.

I agree that the words "fit and convenient" in s. 24, sub-s. 4, indicate something more than, and something different from, the mere converse of structurally deficient or structurally unsuitable. I think premises might well be held to be not fit and convenient for the purpose of a licensed house, although they could not be properly described as being structurally deficient or structurally unsuitable, so as to bring the case within the grounds of refusal reserved by the schedule. I also think there is great force in the argument of Mr. Montgomery that we should not lightly attribute to Parliament the intention of compelling the justices to grant a removal of an old on-licence to a house built on a site which those justices considered quite unsuitable for such a purpose, e.g., a house adjoining a church on one side and a school on the other. It may be that such premises would rightly be regarded as not being convenient for the purpose of a licensed house, using the word "convenient" as being equivalent to "conveniently situated." It is not necessary to decide that matter in the present case, and I prefer to express no opinion on the point.

I cannot, however, think that the words "fit and "convenient" can be so construed as to restore to the justices the free and unfettered discretion in granting or refusing an application for a special removal of an old on-licence which is expressly taken away from them by the other sections of the Act of 1910 to which I have alluded. If the justices are free to refuse such an application on the ground that a new licensed house is not required in the neighbourhood to which it is proposed to remove the old on-licence, it appears to me that the provisions of those sections are otiose. The matters usually taken into account by justices in granting or refusing an application for a new licence (where their discretion is unfettered) may be said to be: (1.) matters affecting the applicant, (2.) the suitability of the premises, and (3.) the wants of the neighbourhood. In the case of an application for the renewal, transfer or special removal of an old on-licence they will still properly consider the first two of these matters. Are they entitled to base a refusal on the third? If the contention of the justices is to be upheld, their discretion remains as wide in such a case as if they were considering an application for a new licence. In my opinion, that is not the law.

I do not say that the justices were wrong in considering the topic of the needs of the neighbourhood, but in my opinion their power of refusal on that ground no longer exists. The right of referring the matter to the compensation authority is substituted for the power of refusal. It was argued that we were bound in this case to assume that the old premises were not redundant, and, therefore, could not properly be the subject of a reference to the compensation authority. I cannot accept that view, there being no evidence on the subject, and redundancy—a word not to be found in the Act—is only one of the matters proper to be considered in the first place by the licensing justices and, in the event of a reference, by the compensation authority. However that may be, I do not think that any such consideration can affect the proper meaning to be given to the words "fit and "convenient" in s. 24, sub-s. 4.

Mr. Montgomery referred us to *Traynor* v. *Jones* (1). In that case the court held that, while the holder of a beerhouse licence granted before May 1, 1869, could only be refused a renewal or (following *Simonds* v. *Justices of Blackheath* (2)) an ordinary transfer, of his licence on one of the four grounds stated in s. 8 of the Wine and Beerhouse Act, 1869, yet on an application for a grant under s. 14 of the Alehouse Act, 1828, the justices had complete discretion in the matter. The law, however, has been altered since the date of that decision, and a special removal is now clearly on the same footing as a renewal or transfer. In my opinion, it has been shown that the justices in this case acted in excess of jurisdiction, and have not, therefore, heard and determined according to law, and I think the order of mandamus should go.

Wrottesley J. (read by Humphreys J.). The Cornopean Inn, St. Leonards Road, Weymouth, was rendered unfit for use as licensed premises by an unforeseen and unavoidable calamity, to wit, a German bomb. Accordingly, the licensee became entitled to apply for what is called in the Licensing (Consolidation) Act, 1910, s. 24, sub-s. 2, a special removal, for where the premises have to be pulled down for public purposes, or are destroyed by some agency outside the licensee, different considerations and a different procedure apply from those which apply in the case of an ordinary removal. In the case of an ordinary removal the justices may authorize it or not at their discretion, and a removal may be either inside the licensing district, or to another licensing district in the same county, if authorized by the justices of this other district: s. 24, sub-s. 3. In the case of a special removal, it must be to premises inside the licensing district, and the premises must in the opinion of the justices be "fit and "convenient for the purpose."

In the case of an ordinary removal the justices have the same power as in the case of an application for a new licence, due regard being had to the interests of the owner and licensee of the old premises. They have unfettered discretion except

(1) [1894] 1 Q. B. 83.

(2) 17 Q. B. D. 765.

in the matter of the levy for compensation, but in the case of a special removal their discretion is fettered as in the case of a transfer, that is to say, the transfer of a licence from the holder to a transferee who thereby becomes the holder. And since this licence is an old on-licence, by s. 23, sub-s. 2 (*c*), its transfer is governed by the special provisions affecting its removal, that is to say, the justices may not refuse a transfer except on one of the grounds set out in part II. of sch. II. to the Act of 1910. In the main these grounds are failure in the past to carry on the business properly, the character of the proposed holder, and the unsuitability of the premises. It is enough to say that none of these grounds applies in this case.

The result, therefore, of the statutory provisions governing this case may be stated as follows. The justices may authorize the removal of this licence to any premises within the licensing district which are, in their opinion, fit and convenient for the purpose. Their discretion is by no means unfettered. In the absence of things admittedly absent in this case, such as defects in the licensee or the nature of the new premises, the justices must grant the application provided it is for a removal to premises which are, in their opinion, fit and convenient for the purpose. The only respect in which the justices find that the premises to which it was proposed to remove the licence fell short of this standard is that they lie in a neighbourhood which is already adequately served.

The real, and, as I understand it, the only question to be resolved is whether the justices may, in entertaining the application to transfer this licence, consider whether the new premises are on an appropriate site. Whether or not they have such a power must depend on the language of the statute. The language is that the premises must be, "in the opinion "of the justices, fit and convenient for the purpose." It is admitted that the premises are fit, so far as structure and lay-out are concerned. Are they also convenient ? I take it to be an elementary rule of construction of an Act of Parliament that, in using the word "convenient," the Act meant something different from and in addition to "fitness." As was pointed out by Humphreys J. in the course of the argument, the words "fit and convenient" are taken directly from s. 14 of the Alehouse Act, 1828. Still, I cannot think that the word "convenient" applies merely to the architectural design or layout of the premises. The word "convenient" appears to me to be a useful, or shall I say, convenient word to deal not merely with the premises, but also with their surroundings. We can all of us think quite readily of surroundings which would make a public house most inconvenient however admirable the nature of its structure, such as the fact that next door was a church, a school, or a row of purely residential buildings. If the argument put forward on behalf of the licensee is sound, all these matters lie beyond the proper purview of the justices. All that the licensee has to do is to obtain or erect a public house in an area or on a site, however incongruous, however overcrowded with licensed premises, and the justices must submit and forbear even to inquire into the nature of the surroundings. It would be, indeed, unfortunate if the justices were so limited.

As it happens, the matter is not concluded by authority, for the two cases cited to us provide no guidance. The report of *Boodle* v. *Birmingham Justices* (1) does not disclose whether the licence under discussion was or was not an old on-licence. In *Traynor* v. *Jones* (2) such a licence and its privileges came under discussion. It was decided that the privilege attached to the house and not to the licence holder, so that, if the house disappeared, the privilege disappeared with it; but I think counsel for the licensee was right in saying that the Licensing Act, 1904, and the Consolidating Act of 1910, altered the law in this respect and allows, at any rate, one special removal to a new house, provided that none of the grounds in sch. II. apply, and provided that, in the opinion of the justices, the new premises are fit and convenient for the purpose.

We have, therefore, to approach the question without any help from authority, but there are things which afford some guidance. We have to answer the question: What is the purpose for which the premises are to be convenient? The words "for the purpose" appear to be a deliberate addition to the words of the Alehouse Act, 1828. Some light on their meaning is thrown by considering the ground on which application for a special removal may be made. It is "that "the licensed premises have been rendered unfit for use for "the business there carried on under the licence." If, therefore, the new premises are to be convenient for the carrying on of the business of the old premises, the justices in this

(1) 45 J. P. 635.

(2) [1894] 1 Q. B. 83.

case were not exceeding their powers in refusing to remove the licence from a neighbourhood where, presumably, it filled a public need to a neighbourhood already fully served by existing licensed houses.

It was argued strenuously on behalf of the licensee that the decision of the justices was, in effect, the refusal of a special removal on the ground of redundancy, a ground admittedly not open to them in the case of renewal or transfer from one licensee to another, and, therefore, by the provisions of the relative sections, not open to them in the case of a special removal. I agree that the justices are not entitled on this ground to refuse an application for a special removal. Had the old licensed premises been redundant, the removal to new premises in the same neighbourhood could not have been refused. That, however, is not this case. The claim is to remove into a new neighbourhood which is already fully stocked with public houses a licence which was not redundant. Finally, it was suggested that the removal should have been permitted, and should have been accompanied by a reference of the new licensed premises to the compensation authority. I can find no justification for this in the Act, and it appears to me to be quite out of keeping with the whole policy of the Act. It would burden the compensation fund with a new redundancy while leaving the old neighbourhood unprovided with licensed premises.

For these reasons, I should refuse the application, leaving the licensee to put forward a more reasonable proposal, but, since the other members of the court hold a different opinion, I can only conclude that I am wrong in my reasoning.

CROOM-JOHNSON J. In view of the arguments presented to us, and the authorities, it is necessary, I think, to consider to some extent, and briefly, the history of the earlier legislation affecting this matter. Sect. 1 of the Alehouse Act, 1828, gave licensing justices, in the exercise of their discretion, power to grant at the general annual licensing meeting licences to persons keeping or about to keep inns to sell exciseable liquors by retail to be drunk or consumed on the premises. Sect. 4 of the same Act gave them power, as therein provided, in the exercise of their discretion, similarly at special transfer sessions to license persons intending to keep inns theretofore kept by other persons about to remove from such inns, that is, for transfer of a licence from one person to another. Sect. 14 contained a number of provisions for transfer in case of death, change of occupancy or other contingency. The material provision was as follows: "If any house being kept as an inn "by any person duly licensed . . . shall be by fire, tempest "or other unforeseen and unavoidable calamity rendered unfit "for the reception of travellers and for the other legal purposes "of an inn it shall be lawful for the justices . . . for the "division or place in which the house so kept . . . shall be "situate . . . to grant to the person whose house shall have "become unfit for the reception of travellers or for the other "legal purposes of an inn and who shall open and keep as an "inn some other fit and convenient house, a licence to sell "exciseable liquors by retail to be drunk or consumed therein." Such a licence was to continue in force until the next annual general licensing meeting. That power enabled the justices to transfer the licence from one house to another. Apparently, both types of change, person to person and house to house, were known as transfers. The power of the justices to grant licences and renewals was within their unfettered discretion: see *Sharpe* v. *Wakefield Justices* (1). There was no express reference to discretion in s. 14 of the Act of 1828, but in *Boodle* v. *Birmingham Justices* (2) this court held that a refusal of an application under that section on the ground that the locality of the new house was already well supplied with licensed houses could not be interfered with. The reason given was that it had been settled that the discretion of the justices in matters of transfer was the same as in the case of a new licence and that that discretion was absolute, and the decision in *Reg.* v. *Lancashire Justices* (3) was referred to. Manisty J., in *Boodle* v. *Birmingham Justices* (2), appears to have drawn a distinction between a fit and convenient house and the ground on which the justices in fact exercised their discretion. It was not, apparently, argued that the words "fit and convenient house" empowered the justices to examine into the sufficiency of the supply of other licensed houses in the district. In *Simonds* v. *Blackheath Justices* (4), on an application for a transfer of the licence of a beerhouse licensed before May 1, 1869, from one person to another, it was held that the discretion of the justices to refuse the application was limited to one or more of the four grounds specified in ss. 8 and 19 of the Wine and Beerhouse Act, 1869, which it is not necessary to set out. *Traynor* v. *Jones* (5) was a case of a refusal of an application for a grant of a licence by way of transfer on removal from another pre-1869 beerhouse under s. 14 of the Alehouse Act, 1828. It was held, again by this court, that the general discretion conferred on justices was in such a case not within the language of the special exceptions engrafted upon the general rule by s. 19 of the Act of 1869 and was still absolute.

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(1) [1891] A. C. 173.
(2) 45 J. P. 635, 637.
(3) (1870) L. R. 6 Q. B. 97.
(4) 17 Q. B. D. 765.
(5) [1894] 1 Q. B. 83.

That being the state of the law, it was altered as from January 1, 1905, by the Licensing Act, 1904. The power to refuse the renewal of an existing on-licence on grounds other than certain specified limited grounds thereby became vested in quarter sessions instead of in the justices of the licensing district. On any ground other than those specified the justices were empowered to refer the matter to quarter sessions, together with their report, and quarter sessions could then refuse to renew the licence, but subject to the payment of compensation: Licensing Act, 1904, s. 1, sub-s. 1. The provisions of that Act were made by s. 9 to apply to the transfer of an existing on-licence as they applied to the renewal of an existing on-licence, with the substitution of transfer for renewal, and the expression "transfer" was defined to mean a transfer under s. 4 or s. 14 of the Alehouse Act, 1828. This was a completely new departure, and the absolute or unfettered discretion of the licensing justices to refuse a renewal or transfer, as defined, disappeared. Accordingly, their right to refuse a transfer "to some other fit and convenient house" under s. 14 of the Act of 1828, which remained in force until repealed by the Licensing (Consolidation) Act, 1910, became limited to the cases set out in s. 1, sub-s. 1, of the Act of 1904. The Licensing (Consolidation) Act, 1910, came into force on January 1, 1911, and the provisions of s. 14 of the Act of 1828 were re-enacted with amendments in new sections. The transfer of a licence to other premises is in that statute called a removal.

The powers of licensing justices to authorize the removal of a justices' licence from the premises in respect of which it was granted to other premises is now contained in s. 24 of the Licensing (Consolidation) Act, 1910, sub-ss. 1, 2 and 4. Removals are "ordinary" and "special," but the discretion conferred as to special removals is subject to the provisions of s. 27. That section is marginally described as "Procedure on "applications for special removal," but it obviously extends to the powers of the justices as well as to procedure. The power

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to authorize the transfer of a justices' licence "to one person "in substitution for another" is contained in s. 23, which in terms, in sub-s. 2, empowers licensing justices to allow or refuse the application in the exercise of their discretion, subject, so far as the present case is concerned, to the special provisions of the Act affecting the renewal of an old on-licence, which this was.

What then are the special provisions of the Act affecting the renewal of an old on-licence? They are to be found in s. 16, sub-s. 1, s. 18, sub-s. 1, and s. 19, sub-ss. 1 and 2. It is sufficient to say that the ground that the needs of the neighbourhood were already adequately served is not one of the grounds specified in part II. of sch. II. We were invited to hold that the power to authorize does not include a power to refuse an application for special removal, and that the discretion of the justices when refusing is not bound by the same conditions as when authorizing. I have come to the conclusion that the word "authorize" in s. 27, reading that section with s. 23, sub-s. 2, which refers in terms to allowance or refusal, includes, and must include, a power to refuse an application for an authorization, and subject to the same limitations on the exercise of the discretion.

It is clear, therefore, that the licensing justices have no power to refuse a renewal on the ground of redundancy, as it is sometimes called, and, by parity of reasoning, to refuse a special removal on the ground that the old licensed premises were no longer required. Can they consider what the result would be, so far as redundancy is concerned, if the special removal were authorized? Rules 44 and 45 of the Licensing Rules, 1910, appear to recognize the duty of the licensing justices to refer the whole question of special removal to the compensation authority where the grounds are other than those specified. Rule 44 refers in terms to s. 19, s. 23, sub-s. 2, and s. 27. Both rules appear to treat the question of redundancy on an application for special removal as one for report by the justices to the compensation authority and not for the exercise by them of their own discretion in considering whether to authorize the special removal. If, notwithstanding what I have said, the question of existing sufficiency of licensed premises in the neighbourhood is one proper to be entertained by the licensing justices, it can only be, I think, by giving a construction to the words "fit and convenient premises for the purpose," in s. 24, sub-s. 4, wide enough to embrace it, and at first sight such a construction is inconsistent with the other sections which I have quoted.

Although defined, for valuation purposes--see Finance Act, 1911, s. 4—there is no special meaning to be attached to the word "premises" in licensing law. The word is, however, used several times in s. 24, and in ordinary language, I think, means the licensed buildings. They are not to be fit and convenient generally, but fit and convenient for the purpose, having regard, no doubt, to the necessity for supervision and so forth. There is nothing in the precise words used to suggest that some other test of fitness or convenience, connected with other licensed premises in the neighbourhood and the needs of the public generally, is to be considered. Indeed, the words "for the purpose" in their context, to my mind, suggest the contrary.

What is "the purpose" in s. 24, sub-s. 4? I think it means fit and convenient to take the place of the premises already licensed, from which the licence is to be removed, and which, in this case, have been rendered unfit for use for the business there carried on under the licence: s. 24, sub-s. 2. If the argument for the justices were right, then the question of the existence of a ground other than those specified could be examined and decided by the justices for the purpose of a special removal, although they are in effect prohibited from so doing on an application for a renewal except for the purpose of a reference and report and notwithstanding that the statute in effect provides that the rules on renewal are to apply to a special removal. Furthermore, if the argument were right the law in a case of special removal would have been put back to what it was before January 1, 1905—a somewhat startling result, in view of the reform obviously intended by the Act of 1904. I think that the construction suggested by the justices of the words "fit and convenient for the purpose," in the context in which they are to be found, is an unnatural and forced one, and I can find no justification for it. I express no opinion on what matters it is within the jurisdiction of the justices to consider in deciding whether proposed new premises in such a case are fit and convenient for the purpose, or whether they can lawfully consider (to any, and, if so, what extent) the convenience or situation of the site, as that point does not, in my view, arise for our decision.

Boodle v. *Birmingham Justices* (1) was pressed on us as an authority in favour of the justices. It seems to me, however, to be an authority dealing with an entirely different state of the law. The discretion conferred on justices by the Act of 1828 was in effect swept away by the Act of 1904, or, at least, only survived in a very limited form, and s. 14 of the Alehouse Act, 1828, differs in many material particulars from s. 24, sub-s. 2 (*a*), of the Act of 1910: see per Lord Hewart C.J. in *Rex* v. *Liverpool Justices* (1). *Traynor* v. *Jones* (2) was also relied on for the justices, but, without dealing in more detail with the decision, it seems to me to involve no more than the proper construction and application of the language of ss. 8 and 19 of the Wine and Beerhouse Act, 1869, which, it was held, left untouched the general discretion when dealing with applications for a grant of a licence of a pre-1869 beerhouse by way of removal under s. 14 of the Act of 1828. It also dealt with an entirely different state of the law. Rightly understood, those cases are of no assistance to the justices.

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(1) 45 J. P. 635.

The licensing justices have refrained from referring the licence to the compensation authority. Possibly they could have proceeded under rr. 44 and 45 if they had desired to have the question decided by the competent authority. If their order stands, they may, as a result, have deprived the licensee of his chance of obtaining compensation in respect of his licence. In my opinion, they have exceeded the limits of their jurisdiction, they have taken into consideration matters not proper to be taken into account by them in dealing with an application for special removal, and they have failed to hear and determine the licensee's application according to law. In my judgment the order of mandamus should be made.

Order of mandamus granted.

Solicitors for licensee: *Godden, Holme & Ward, for Pengilly & Ridge, Weymouth.*

Solicitors for justices: *Monro, Saw & Co., for G. A. Lipscombe, Weymouth.*

A. W. G.

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(1) [1934] 2 K. B. 277, 283.

(2) [1894] 1 Q. B. 83.

HUTCHINSON *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

C. A.

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Railway—Prevention of accidents—Work on line—Provision of look-out—"Where any danger is likely to arise"—Duty of company—Contributory negligence—Damages—Assessment—Railway Employment (Prevention of Accidents) Act, 1900 (63 *&* 64 *Vict. c.* 27), *s.* 1, *sub-s.* 1; *sch. No.* 12—*Prevention of Accidents Rules,* 1902, (*St. R. & O.,* 1902, *No.* 616), *r.* 9.

By r. 9 of the Prevention of Accidents Rules, 1902, made by the Board of Trade under s. 1, sub-s. 1, of, and the schedule (No. 12) to, the Railway Employment (Prevention of Accidents) Act, 1900: "With the object of protecting men working singly or in "gangs on or near lines of railway in use for traffic for the purpose "of relaying or repairing the permanent way of such lines, the "railway companies shall . . . . in all cases where any danger is "likely to arise, provide persons or apparatus for the purpose of "maintaining a good look-out or for giving warning against any "train or engine approaching such men so working . . . ." By r. 234 (*a*) of the London and North Eastern Railway Company's rules: "When a train is approaching, men at work on a "permanent way must not remain on any running lines . . . . "unless they can distinctly see that they are in a place of safety "and in no danger from another train approaching them "unobserved . . . ."

Three men, employed by the company, were killed by the engine of a northbound train while they were at work on the main line. At the moment of the accident a southbound train had just passed, its noise preventing the men from hearing the approach of the northbound train, but they had remained on the northbound line. The company had not provided any person or apparatus "for the purpose of maintaining a good "look-out":—

Held, that the words "in all cases where any danger is likely "to arise" in r. 9 must be given their ordinary meaning and not limited to cases of unusual or abnormal danger, and that the company had been guilty of a breach of statutory duty.

Circumstances discussed in which the men, although they had disregarded r. 234 (*a*), were *held* not to be guilty of contributory negligence.

APPEAL from Croom-Johnson J.

The plaintiff was the widow of Frederick Hutchinson, one of the men who was killed in the circumstances set out in the head-note, and brought her claim under the Fatal Accidents Acts, 1846-1908, for the benefit of herself and her two sons, aged fourteen and twelve, and also under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix and for the benefit of the deceased's estate, the claim being based on the allegation that the company had been guilty of a breach of statutory duty, namely, failing to comply with r. 9 of the Prevention of Accidents Rules, 1902, by reason of which the accident was caused. The company denied that they had been guilty of any breach of the rule and pleaded that Hutchinson had been guilty of contributory negligence in failing to comply with r. 234 (*a*) of the company's rules. Hutchinson was a man of fifty-five, his widow being of the same age, and had long been employed by the company at a wage of 3*l.* a week. Croom-Johnson J. assessed the damages recoverable under the former Act at 450*l.*, of which he awarded 200*l.* to the two children in equal shares, and under the latter Act at 250*l.*, so that the widow received 250*l.* only. During the hearing of the appeal it was agreed between the parties that the amount payable to the widow should be increased by 200*l.* Croom-Johnson J., however, dismissed the action on the grounds that the work which the men were doing at the time of the accident was ordinary work on the line, performed in normal conditions and therefore r. 9 of the rules of 1902 did not apply and that the real cause of the accident was the negligence of Hutchinson in remaining on the line in breach of rule 234 (*a*) of the company's rules.

The widow appealed.

Macaskie K.C. and *J. Charlesworth* for the widow. The appeal should be allowed and compensation of the amounts assessed by the judge should be paid. The company committed a breach of their statutory duty to provide a look-out. It is true that r. 234 (*d*) of the company's rules (1) places a duty on the ganger, but the company cannot delegate its duty under r. 9 of the rules of 1902 to a ganger and leave him to decide if and when a look-out shall be appointed: *Vincent* v. *Southern Railway Co.* (2). The judge was wrong in holding that the accident was caused by Hutchinson's negligence in electing to stay on the line when he must have known of the approach of the southbound train, for r. 234 (*a*) of the company's rules was directed, not to him, but to the ganger. There is no evidence of when Hutchinson knew of the approach of either train. Moreover, r. 234 (*a*) is not a "regulation." It is merely a warning to men to have great regard for their own safety when they are on the line: *Lewis* v. *Denye* (1) per Viscount Simon L.C. All the evidence goes to show that the men were very intent on their work, a circumstance which must be taken into account: *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2).

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(1) By r. 234 (*d*) of the Company's rules: "When work is "about to be undertaken on or "near lines in use for traffic and "danger is likely to arise, the "ganger or man in charge must "appoint one or more persons, as "may be necessary, expressly to "maintain a good look-out, and "to give warning of any train "approaching. . . . ."

(2) [1927] A. C. 430.

Paley Scott K.C. and *Felix Denny* for the company. The interpretation of r. 9 accepted by the judge is correct. Before the rule can compel the appointment of a look-out, there must be something beyond the mere danger that must always exist on every line on which trains are running. The words "in all cases in which any danger is likely to arise" mean "in any place where anything abnormal may arise." In the present case, however, there was no unusual or abnormal danger and there was no need for a look-out. On the other hand, Hutchinson was guilty of contributory negligence. The evidence shows that the southbound train must have reached the men before the northbound train, since, at the moment of the accident, it had passed them. Thus, Hutchinson must have heard the southbound train, but he took no notice of it, and, in disregard of the company's r. 234 (*a*), he remained on the northbound line.

LORD GREENE M.R. In my opinion the construction of r. 9 of the Prevention of Accidents Rules, 1902, which was accepted by the judge is much too narrow. I think that the phrase "in all cases where any danger is likely to arise" means what it says, and I do not see how it can be disputed that danger is likely to arise to any men who are working on a main railway line, quite apart from any special circumstances, and that the rule is directed to making provision to guard against that danger. It is said by Mr. Paley Scott, on behalf of the railway company, that some limitation must be put on the words "in all cases where any danger is likely to arise." He contends that, if they are held to cover the ordinary, normal case of work on a railway line which is in ordinary use, there would be no need for them because wherever men are working on a line which is being used for traffic there must be some danger. I do not agree. It is manifest, to my mind,

(1) [1940] A. C. 921, 929. (2) [1940] A. C. 158, 178, 179.

that there may be no danger to men working on the line in many cases where work is being done on a railway in use for traffic, which means a railway which is not closed or abandoned. For instance, it is clear that, if there were a branch line with only two or three trains a day at long intervals, during those intervals no danger would be likely to arise, and, had the words under consideration not been inserted in the rule, it would have been obligatory on the company to provide a look-out even on such a line during such intervals, which would be absurd. Further, the obligation arises not merely when men are working on the lines but also when they are working near them. That is a somewhat vague expression, but, had it not been for the presence of the words "in all "cases where any danger is likely to arise," it would have been necessary for the company to provide a look-out for all men working near lines although the circumstances of their work were not calculated to lead to any danger. It seems to me, therefore, that the search for a context to cut down the plain meaning of those words fails, and that they must be given their ordinary meaning. It is not disputed that there was danger in the work that these men were carrying out. All that is said is that the danger was not an exceptional danger and that therefore, on its true construction, the rule did not apply. I find, therefore, that the company was guilty of a breach of its statutory duty in failing to provide a proper look-out in accordance with the rule. It is quite clear that if a look-out had been provided this accident would never have happened.

The matter, however, does not end there. The company alleges that Hutchinson was guilty of contributory negligence, and the learned judge, in effect, although not in terms, so finds on the hypothesis that, contrary to his own opinion, r. 9 applies to the case. The particular act of contributory negligence which is alleged against Hutchinson is that he failed to leave the metals of the northbound line on becoming aware of the approach of the southbound train. It was, I think, established that the reason why the men did not hear the whistle given by the on-coming northbound train was that the noise of the southbound train prevented their doing so. Rule 234 (*a*) of the company's rules deals with this very case, and is aimed at avoiding this very danger. The force of a rule of this kind is not to be exaggerated. If the rule is directed, as this rule obviously is, to warning men of the character of a particular danger and telling them what to do to avoid it, it is clear that non-observance of the rule is evidence of negligence, but the force of the rule is no stronger than would be evidence that every permanent way man who knew his work was well aware of this danger and knew how to avoid it. The fact that the rule is brought to the man's attention merely fixes him with knowledge of the existence of a danger and the proper way to escape it. It is true that, for the purpose of bringing the rule to the man's attention, the fact that it is in writing is extremely cogent, but, in the last resort, the non-observance of the rule, assuming that it is known to the men concerned, as was the case here, is no more than evidence of negligence, meaning, in the case of contributory negligence, negligent disregard by the men of their own safety. In such a case, however, the defendant must establish one more fact, namely, that the man had a reasonable opportunity of complying with the rule. It may very well be that a man who knows the rule but does not obey it nevertheless cannot be held guilty of contributory negligence when all the circumstances are known.

I will call attention to one matter which is of great importance in dealing with the breach of a statutory rule which is made as much to protect the men against their own carelessness as it is to protect men who are careful. In *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, Lord Wright said (1): " What is all-important is to adapt the standard of what is "negligence to the facts, and to give due regard to the actual "conditions under which men work in a factory or mine, "to the long hours and the fatigue, to the slackening of "attention which naturally comes from constant repetition "of the same operation, to the noise and confusion in which "the man works, to his pre-occupation in what he is actually "doing at the cost perhaps of some inattention to his own "safety." In this case the railway company is in a difficulty which often arises where the person involved in the accident is dead. In such cases it is frequently impossible for the party who desires to do so to establish negligence through lack of evidence. In the present case the company cannot obtain from a survivor any admissions or precise information of what the men heard, saw and knew at the time and what was their state of mind having regard to the great attention which they were obviously paying to their work.

Accordingly, the result is that the company establishes

(1) [1940] A. C. 152, 178, 179.

that the rule was brought to Hutchinson's knowledge and was disregarded to the extent that he remained on the northbound line after he had heard or seen the southbound train. The company fails, however, to prove at what moment he became aware of the southbound train. He was accustomed to working in the conditions which existed, and at the relevant time the men were very intent on their work, all of them stooping and directing the whole of their attention to it. and Hutchinson may not have heard the southbound train until it was practically abreast of him. If that were so, he may not have had any real opportunity of getting off the line in time to save himself from being struck by the northbound train. Again, Hutchinson was working under the orders of the ganger. We do not know what work the men were doing or whether the ganger had given any order which diverted the men's attention from the possibility of an oncoming train. We do not know to what extent the men or the ganger may have been temporarily misled by the fact that the northbound train was a quarter of an hour late. I do not think that any court could have found Hutchinson guilty of contributory negligence if he had not been killed and had given evidence, which was believed, that he was paying little attention to trains because he was doing a difficult piece of work, that the ganger had just given an order, that he did not notice the southbound train until it was abreast of him, and that the fact that the northbound train was a quarter of an hour late had caused him to forget about it. The evidence is as consistent with all those things having been the case as with their not having been the case, and, in my view, where there is a defence of contributory negligence in an action based on breach of a statutory rule which is designed to protect men as much from their own carelessness as from anything else, it is wrong to draw inferences unfavourable to a deceased man and impute to him all those elements the absence of which would negative any negligence on his part.

The matter is, however, more complicated than that. There were three men in the gang. There were originally five, but, owing to precautions against possible enemy interference which the company was at the moment taking, this gang was depleted by the withdrawal of two of its members. It is quite manifest that in those circumstances the work of the remaining three became heavier, and men who were keen on their work and wished to get it done, particularly if they had an energetic ganger, would work all the harder and pay the more attention to it.

Rule 234 (*d*) of the company's rules echoes with some modifications the language of r. 9 of the Prevention of Accidents rules. The case for the company—and, from the business point of view, it is a reasonable one—was that it is left to gangers, who are responsible and skilled men, to decide whether or not under that rule there ought to be a look-out. Rule 234 (*d*), of course, or the company's method of carrying it out, cannot in the least excuse the company from non-compliance with the statutory rule, but r. 234 (*d*) was brought to the knowledge of all the men concerned, including Hutchinson, just as much as were the other rules, and the ganger did not think it necessary to appoint a look-out man. In fact, it appeared from the evidence that it never was the practice to appoint look-out men when only three or four men are working. It seems to me that, where that is the practice of the company, and where the obligation on the men under r. 234 (*a*) is simply to move off the rails unless they can distinctly see that they are in a position of safety, there is a great deal to be said for the view that a reasonable man would be entitled to conclude that it was a matter for the ganger who had not chosen to appoint a look-out man. If the men were doing work under the orders of the ganger, as these men were at the moment of the accident, and if they must be taken to have been where they were on his instructions, to impute contributory negligence to them is to impose much too high a standard on workmen of this kind, doing this class of work in circumstances of this description.

I have, therefore, come to the conclusion that the learned judge erred in dismissing this action. In my opinion, he should have found that the company was guilty of a breach of statutory duty, and he should have negatived contributory negligence on Hutchinson's part. As I think has clearly appeared, I base my decision on the latter part of the case on the ground that the company has not discharged the onus which is on it of establishing that, in all the circumstances whatever they may have been, and we do not know many of the most important circumstances, the disregard of r. 234 (*a*), if it was disregarded, was evidence of negligence by Hutchinson. The damages assessed by the learned judge, on the footing that his judgment might be held to be wrong, were, I think, on the low side, but we need not consider the damages because the parties have come to terms which, so far as the two infant children are concerned, do not increase the damages which the learned judge thought they should receive, but leave them at a sum which, in our opinion, is fair and adequate. The increase is in the amount allowed to the widow who is in competent hands and able to make up her own mind, and it is not for us to express any view on that matter. The appeal will, therefore, be allowed, with costs here and below.

MACKINNON L.J. I agree.

GODDARD L.J. I agree. With regard to the construction of r. 9 I am bound to say that, but for the learned judge having taken another view, I should have thought that the question was unarguable. The rule is unambiguous. It is made in pursuance of a statute which contemplates rules being made for " reducing or removing the dangers and risks incidental "to railway service," and one of the purposes for which rules may be made is " protection to permanent way men when "relaying or repairing the permanent way." The danger which is incident to the service of such men is that of being run down by a train. Therefore, when a rule, made in pursuance of that statute, lays down that the company shall provide a look-out " in all cases where any danger is likely to "arise " there is no ground for saying that that rule is to be construed as meaning any unlikely danger. The words are: "Where any danger is likely to arise." An abnormal or unusual danger is not "likely to arise." It is difficult to foresee. There is no reason for giving to those words any other than their plain, natural meaning. Consequently, in my opinion, there was here a clear breach of statutory duty by the company.

It is only too common to find in cases where the plaintiff alleges that a defendant employer has been guilty of breach of a statutory duty, that a plea of contributory negligence has been set up. In such a case I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent. The real incentive for the observance by employers of their statutory duties under Railway Acts, Factory Acts, Dock Acts and similar legislation is not their liability to substantial fines, but the possibility of heavy claims for damages. Such legislation would be nugatory if, in every case, employers could disregard the statute, and allege that, although they did not provide a look-out or a guard or a fence, as the case might be, nevertheless the plaintiff could see the danger and, therefore, ought to have ceased working, which in many cases might mean dismissal, or to have taken some extra precaution which was not taken. In *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1) Lawrence J. used words which have been described by Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2) as " a valuable contribution to the law on "this subject." He said : " I think, of course, that in con-"sidering whether an ordinary prudent workman would have "taken more care than the injured man, the tribunal of fact "has to take into account all the circumstances of work in a "factory and that it is not for every risky thing which a "workman in a factory may do in his familiarity with the "machinery that a plaintiff ought to be held guilty of con-"tributory negligence." Lord Wright, in his opinion in the same case where it came before the House of Lords (1), cited the judgment, in *Caswell* v. *Worth* (3), of Lord Campbell C.J., who said : " Here there was not only a want of ordinary care, "but a knowing and wilful incurring of the risk by the plaintiff." It is true that in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (4), Lord Wright said : " If the matter had been free from "authority, I should, I think, have thought it simpler to hold "that a workman's claim for injury caused by breach of the "employer's statutory duty to fence and like duties, is only "barred by blameworthy conduct on the man's part of such "gravity and so directly causing the accident as in the judgment "of the judge or jury to be properly described as the substantial "cause of the accident and to shift the responsibility to him. ". . . . The rules of contributory negligence have been "mainly developed in connection with road accidents, but at "least since *Davies* v. *Mann* (5), the law in discussing con-"tributory negligence in such cases has disregarded as not "materially contributing causes some acts of the plaintiff "which might be regarded as negligence in a sense, and treated "them as of subsidiary moment in ascertaining the causation "of the injury and has fixed attention on what was judged to "be the proximate or effective cause. Hence the question was

(1) [1934] 2 K. B. 132, 140; [1936] A. C. 206, 214, 215.

(2) [1940] A. C. 152, 175.

(3) (1856) 5 E. & B. 849, 854, 855.

(4) [1940] A. C. 152, 178, 179, 180.

(5) (1842) 10 M. & W. 546.

"stated as it was in *Swadling* v. *Cooper* (1) to be what was the "substantial cause. Contributory negligence involves two "elements, negligence and contributing negligence. The "policy of the statutory protection would be nullified if a "workman were held debarred from recovering because he was "guilty of some carelessness or inattention to his own safety, "which though trivial in itself threw him into the danger "consequent on the breach by his employer of the statutory "duty. It is the breach of statute, not the act of inadvertence "or carelessness, which is then the dominant or effective cause "of the injury." I ask myself how those words apply to this case. The statute imposes on the company a duty to provide a look-out to guard against the very accident which happened. These accidents happen because the men working on the line do not hear the approach of a train, through inadvertence or through being absorbed in their work, as is clearly shown by the evidence to have happened in this case. It is true that they were told that if a train approached from one direction they were not to remain on any running line unless they could see that there was no danger coming from the other direction, in other words, that when a train was travelling on one line they were to look down the other to see if it was free. That is a rule, but it is much more a counsel of perfection. The men may be so absorbed in their work that they do not realize that a train is approaching them. Possibly they are willing to take a slight risk and do not look up. It is because those things happen that Parliament has authorized the making of a rule such as r. 9 which imposes on the employer a definite duty to provide a look-out. On the evidence I am satisfied that, with trains passing every eight or nine minutes, it was clear that danger might arise to men working on the line, and it is obvious that, had a look-out man been appointed, the accident would not have happened. I think, therefore, that the only proper conclusion to come to is that the effective, substantial cause of the accident was breach of statutory duty.

Macaskie K.C. The most convenient course would be for the court to direct that the addition of 200*l*. to the widow's portion should go as against her claim under the Fatal Accidents Acts, because the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, attracts estate duty. The court can direct that the whole of the 450*l*. be awarded under the Fatal Accidents Acts.

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(1) [1931] A. C. 1.

GODDARD L.J. It is by far the best practice, in cases of this kind, to claim the whole of the damages under the Fatal Accidents Acts.

LORD GREENE M.R. We will award the whole of the damages under the Fatal Accidents Acts.

Appeal allowed.

Solicitors for plaintiff : *Pattinson & Brewer.*
Solicitor for company : *I. Buchanan Pritchard.*

K. R. A. H.

HOBBS *v.* HUSSEY (INSPECTOR OF TAXES).

1942
Jan. 27, 28 ;
Feb. 18.

Revenue—Income tax—Assessment—Profits or gains—Contract to write life story—Series of articles—Sale of copyright—Performance of services—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. D, case VI.*

The appellant, who had never carried on the profession of an author, entered into a contract with a newspaper to write his reminiscences in a series of articles for payment of a sum of money. The contract involved the sale of the appellant's copyright in the series of articles, which had not been written at the time the contract was entered into :—

Held, that the contract was one for the performance of services ; that the fact that it involved the sale of the appellant's copyright in the articles did not alter the true nature of the transaction ; and that, therefore, the appellant was assessable under case VI. of sch. D in respect of the sum received by him.

Dicta of Rowlatt J. in *Ryall* v. *Hoare* [1923] 2 K. B. 447, 454, followed.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the commissioners held on May 26, 1937, the appellant, William Cooper Hobbs, appealed against an assessment to income tax in the sum of 1350*l.* for the year ending April 5, 1935. The assessment was made under sch. D to the Income Tax Act, 1918, and was in respect of profits as a contributor. The appellant had had no employment since 1924. For some years he had been preparing accounts of episodes in his life and his various experiences. These accounts were prepared from notes in his possession and from his

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personal diaries. In February, 1934, one Austin Smith introduced the appellant to the editor of the People, and in March, 1934, the appellant agreed to write his life story for the People for a payment of 1500*l.* to be made in instalments. The terms of the contract were set out in a letter dated March 7, 1934, from the editor of the People to the appellant in the following terms: "Thank you very much for your letter in which you accept my offer of 1500*l.* (one thousand five hundred pounds) for the serial rights in your life story. This life story should consist of a minimum of twelve instalments of 3000 words each. As far as possible I should like you to supply me with any photographs you may have available of yourself and of the others who will be mentioned in the articles. I have asked our cashiers' department to let you have a cheque for 150*l.* on account. The balance will be paid partly on completion of the manuscript and the remainder on publication." The articles were compiled at the appellant's private residence. They were taken down at the dictation of the appellant by one Corrigan, a stenographer on the staff of the People, who was separately employed by the appellant and worked in his own time. Austin Smith was employed by the appellant to verify facts and check dates, names, etc., as accuracy was essential in the presentation of facts. He was paid 300*l.* by the appellant for his services and as commission on introduction to the People. Corrigan was paid 120*l.* for his services. The articles took a considerable time to compile and on completion they were sent as a whole to the People. The appellant corrected the proofs. The articles appeared in the People in instalments over a period of ten weeks, the first article appearing on April 29, 1934. The appellant retained no interest in the copyright of the articles. He had never, either before or since, engaged on literary work or contributed articles to newspapers.

The commissioners held that the appellant was not carrying on the profession or vocation of an author, but that the said sums were "annual profits or gains" in respect of which he was assessable under case VI., and they fixed the assessment at 1500*l.* less 450*l.* allowed in respect of expenses.

Mustoe for the appellant. The commissioners were wrong in holding that the sums which the appellant received were "annual profits or gains" in respect of which he was assessable to income tax under case VI. of sch. D. *Ryall* v. *Hoare* (1) is distinguishable since in the present case the commissioners have found that the appellant was not carrying on the profession or vocation of an author, whereas in *Ryall* v. *Hoare* (1) it was found that the commissions in question were profits of an employment or vocation exercised by the taxpayer. Evidence of recurrency is of no importance if there is a finding that a trade is being carried on, but if there is a finding that no trade is being carried on evidence of recurrency is of great importance to show that there is a source from which the item sought to be taxed is derived. Rowlatt J. in *Ryall* v. *Hoare* (2) said that "a casual profit made on an isolated purchase and sale, unless "merged with similar transactions in the carrying on of a "trade or business is not liable to tax." In *Earl Haig's Trustees* v. *Inland Revenue Commissioners* (3) it was held by the Court of Session that the sums received by the trustees for the use by Mr. Duff Cooper of Earl Haig's war diaries were capital payments in return for a partial realization of an asset and were not assessable to income tax. In that case Lord Moncrieff said (4) that he did not think that the definition by Rowlatt J. in *Ryall* v. *Hoare* (5) of the word " annual " in the expression " annual profits or gains " could now be regarded as a subsisting one. In *Jones* v. *Leeming* (6) an option for the purchase of a rubber estate was acquired without payment, and on the sale of the option a profit was made. The commissioners found that the transaction was not one in the nature of a trade, and the House of Lords held there was no liability to income tax. In *Sherwin* v. *Barnes* (7) there was only one transaction, but the element of recurrency was present, and, therefore, it was held that the commission paid for guaranteeing an overdraft was assessable to income tax. In the present case there has been a conversion of one form of capital, namely, diaries and memoranda into another form of capital, namely, money. The serial rights in the appellant's reminiscences were being sold, and they are part of the copyright.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. The commissioners came to a correct decision that the sums

(1) [1923] 2 K. B. 447

(2) Ibid. 454.

(3) 1939 S. C. 676; 22 Tax Cas. 725.

(4) 1939 S. C. 687; 22 Tax Cas. 737.

(5) [1923] 2 K. B. 455.

(6) [1930] 1 K. B. 279; [1930] A. C. 415.

(7) (1931) 16 Tax Cas. 278.

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of money paid to the appellant were "annual profits or gains" assessable to income tax under case VI. of sch. D. The question is whether the contract which the appellant made with the People was for the sale of capital or for the rendering of services, and the commissioners were right in the decision at which they arrived. If a man writes a book and then sells it out and out that is a sale of capital, but if a man is commissioned to write a series of articles on any subject that would be a contract for services to be rendered. One important element to be considered is whether the thing sold is complete when the contract is entered into. There is a difference between such a case and one where the thing sold is not in being at that date. An agreement by a man to write his life story is an agreement for services to be rendered. An isolated transaction, so long as it is not of a capital nature, is caught by the Income Tax Act. In *Ryall* v. *Hoare* (1) Rowlatt J. said (2): "Without giving an exhaustive definition, "therefore, we may say that where an emolument accrues by "virtue of service rendered whether by way of action or "permission, such emoluments are included in 'profits or "'gains.' Assuming then that these commissions constitute "'profits or gains,' the further question for consideration is "whether they are 'annual' profits or gains. . . . . The word "'annual' here can only mean 'calculated in any one year,' "and 'annual profits or gains' mean 'profits or gains in any "'one year or in any year as the succession of years comes "'round'." He, therefore, construed case VI. of sch. D as applying to an isolated transaction. In *Martin* v. *Lowry* both the Court of Appeal (3) and the House of Lords (4) approved the interpretation put on the words "annual profits "or gains" by Rowlatt J. in *Ryall* v. *Hoare* (5). Viscount Cave L.C. said that Rowlatt J. "pointed out that in fact the "tax is imposed for one year only, and having regard to that "fact and to the context which accompanies the particular "words which he was called upon to construe, he held that "the words meant simply the profits or gains accruing in the "year in question. I agree with that interpretation." In *Jones* v. *Leeming* both the Court of Appeal (6) and the House of Lords (7) affirmed the decision of Rowlatt J. that the

(1) [1923] 2 K. B. 455.
(2) Ibid. 454.
(3) [1926] 1 K. B. 550.
(4) [1927] A. C. 312, 315.
(5) [1923] 2 K. B. 447.
(6) [1930] 1 K. B. 279.
(7) [1930] A. C. 415.

transaction was an isolated transaction of purchase and sale of an interest in real estate or property, and that the profit resulting from such a capital transaction was a capital profit and did not fall within the words of case VI. In *Sherwin* v. *Barnes* (1) Rowlatt J. followed his former decision in *Ryall* v. *Hoare* (2) and held that the appellant was rightly assessed to income tax in respect of a commission paid to him for guaranteeing a bank overdraft. In *Trenchard* v. *Bennet* (3) Finlay J. held that the transaction in question was not an isolated transaction of guarantee as in *Ryall* v. *Hoare* (2) and *Sherwin* v. *Barnes* (1), but was the acquisition of a capital asset which was not assessable to income tax. In *Brocklesby* v. *Merricks* (4) an architect had introduced a client who had purchased an estate for his company. Subsequently, the architect entered into an agreement with the company to endeavour to dispose of the estate and that he should be paid one-fourth of the net profits of the sale. The estate was sold and the architect was paid his share of the profits of the sale notwithstanding that he had not taken any part in the negotiation for the acquisition or resale of the estate. It was held both by Finlay J. and the Court of Appeal that the architect was properly assessed to income tax under case VI. of sch. D in respect of the sum received by him inasmuch as the sum was paid to him in fulfilment of an enforceable contract. Having regard to those authorities it is impossible for this court to decide the case against the Crown. The decision of the Court of Session in *Earl Haig's Trustees* v. *Inland Revenue Commissioners* (5) was clearly wrong as being contrary to the decided authorities, but in any event that case is distinguishable as the money was paid for the loan of Earl Haig's War diaries to be used by Mr. Duff Cooper whereas in the present case the money was paid for a series of articles written by the appellant.

Mustoe in reply. The contract shows that the money was paid to the appellant not for a series of articles but for the serial rights in the appellant's life story as a whole, that was, for the copyright. If a sum of money is paid to an author for a book or article without any transfer of copyright that is an income receipt, but where, as in the present case, the sum of

(1) (1931) 16 Tax Cas. 278.
(2) [1923] 2 K. B. 447.
(3) (1933) 17 Tax Cas. 420.
(4) (1934) 18 Tax Cas. 576.
(5) 1939 S. C. 676; 22 Tax Cas. 725.

money is paid for the transfer of the copyright that is a receipt on account of capital.

Cur. adv. vult.

1942. Feb. 18. LAWRENCE J. read the following judgment. In this case the commissioners have held that the appellant, a solicitor's clerk, who has never carried on the profession of an author, is assessable under case VI. of sch. D in respect of a sum of money received from the People newspaper for the serial rights in his life story.

It was contended for the appellant that the transaction was a sale of the copyright of the series of articles and, therefore, resulted in the realization of capital and was not a revenue receipt, and the case of *Earl Haig's Trustees* v. *Inland Revenue Commissioners* (1) was relied on. The Solicitor-General, while not admitting that *Earl Haig's Trustees* v. *Inland Revenue Commissioners* (1) was rightly decided, argued that it is distinguishable and that it was settled by *Ryall* v. *Hoare* (2) so far as courts of first instance are concerned, that profits from a single article by a person who is not an author are assessable under case VI. of sch. D. He also submitted that the true question in such cases is whether the transaction in question is really a sale of property or the performance of services, that the present transaction falls into the latter category, and that profits therefrom are therefore of a revenue nature.

In my opinion, the test suggested is correct. Any sale of property where no concern in the nature of trade is carried on must result in the realization of capital: compare *Ryall* v. *Hoare* per Rowlatt J. (3): and it is also true, in my opinion, that the performance of services, although they may involve some subsidiary sale of property (e.g. dentures sold by a dentist) are in their essence of a revenue nature since they are the fruit of the individual's capacity which may be regarded in a sense as his capital but are not the capital itself. Does then the fact that the present transaction involved the sale of the copyright in the appellant's series of articles constitute the profits therefrom capital, or is such sale merely subsidiary to what was in its essence a performance of services by the appellant? In my opinion, the true nature of the transaction was the performance of services. The appellant did not part with his notes or diaries or his reminiscences. He could re-publish the very articles themselves so long as they were not in serial form, and,

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(1) 1939 S. C. 676; 22 Tax Cas. 725.

(2) [1923] 2 K. B. 447.

(3) Ibid. 454.

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HOBBS *v.* HUSSEY.

Lawrence J.

on the whole, I am of opinion that the profits he received were of a revenue nature and not the realization of capital. In the case of *Earl Haig's Trustees* (1) the facts were totally different. The trustees possessed diaries of unique importance and great value, and the view of the Court of Session was that these diaries were capital assets and that the trustees had realized some part of such assets. The court had not to consider the profits received by the author of the book, nor could it be said that from the point of view of the trustees the sale was subsidiary to the performance of services by them.

In any event, in view of the decision of *Ryall* v. *Hoare* (2), approved, as it was, by the Court of Appeal in *Martin* v. *Lowry* (3) and adhered to by Rowlatt J. in *Sherwin* v. *Barnes* (4), I consider that I ought to follow the dicta of Rowlatt J. (5) which are directly in point and were approved by the Court of Appeal. The appeal will, therefore, be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Vivian J. Williams & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

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(1) 1939 S. C. 676; 22 Tax Cas. 725.

(2) [1923] 2 K. B. 447.

(3) [1926] 1 K. B. 550.

(4) 16 Tax Cas. 278.

(5) [1923] 2 K. B. 454.

BANK POLSKI *v.* K. J. MULDER AND COMPANY.

C. A.

1942

Feb. 27.

Bills of exchange—General acceptance—Acceptance in London, payable in Amsterdam—No presentment—Liability of acceptors—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 19.

Bills of exchange drawn in Poland on the defendants, a firm in London, and expressed to be payable in Amsterdam were accepted without qualification. The bills were not presented for payment in Amsterdam, but, after their maturity, the acceptors were called on to pay them. The acceptors having failed to pay, in an action on the bills by holders for value against the acceptors:—

Held, that the acceptance was a general acceptance within s. 19 of the Bills of Exchange Act, 1882, and that the acceptors were liable.

Decision of Tucker J. [1941] 2 K. B. 266 affirmed.

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Bank Polski
v.
K. J. Mulder & Co.

Appeal from Tucker J. (1).

The plaintiffs, the Bank Polski, brought this action against the defendants, K. J. Mulder & Co., as the holders for value of five bills of exchange for various amounts in Dutch florins, all drawn in Poland on May 1, 1939, and payable on November 1 of that year, and all accepted by the defendants. All the bills were in the same form, the first being in these terms: "On November 1, 1939, pay to our order against "this bill of exchange the sum of Dutch florins twenty-two "thousand one hundred and forty." The bill was addressed to K. J. Mulder & Co., Plantation House, Mincing Lane, London, payable in Amsterdam at the Twentsche Bank, and it was drawn by Luban-Wronki, accepted on behalf of the defendants, and subsequently indorsed by Luban-Wronki to the Bank Roluq who indorsed it to the Bank Polski. The defendants were called on to pay the bills in August, 1940, but they did not pay them. It was common ground that the bills had not been presented.

Tucker J. held (1.) that the acceptances were general within the meaning of s. 19 of the Bills of Exchange Act, 1882, as the bills were not expressed to be payable in Amsterdam only and not elsewhere, and, therefore, by s. 52 presentment for payment was not necessary to make the acceptors liable, (2.) that the contracts evidenced by the bills were not required to be performed in a foreign country and, therefore, by s. 72, sub-s. 3, English law and not Dutch law, as the defendants had contended, applied to the case. The defendants appealed.

Wallington K.C. and *Valentine Holmes* for the defendants.

H. G. Robertson for the plaintiffs.

The defendants abandoned the point that Dutch law, which requires presentment and protest of the bill before suing the acceptor, applied: and the arguments were confined to the question whether or not the acceptance was general.

Lord Greene M.R. This is an appeal in an action on certain bills of exchange, the only point which is taken by way of defence being that the bills ought to have been presented for payment, and that, in default of such presentment, the plaintiffs, who are holders for value, are not entitled to sue the defendants who accepted the bills. The point based on s. 72 of the Bills of Exchange Act, 1882, which was raised before Tucker J. by the defendants, is expressly abandoned in this court, and, accordingly I say no more about it.

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(1) [1941] 2 K. B. 266: reported sub. nom. *Banku Polskiego* v. *K. J. Mulder & Co.* This was the name of the plaintiffs as it appeared on the record and was taken from the indorsement on the bill of exchange, the subject of the action. It is, however, the dative case of "Bank Polski."

Before us the argument for the defendants was short and simple. It was that the acceptance of these bills was a "local" acceptance within s. 19, sub-s. 2 (*c*), of the Bills of Exchange Act, 1882. By s. 19, sub-s. 1, of that Act: "An "acceptance is either (*a*) general or (*b*) qualified." By sub-s. 2 (*c*) an acceptance is qualified which is local, that is to say, "an acceptance to pay only at a particular specified "place." It is further provided that "an acceptance to pay "at a particular place is a general acceptance, unless it "expressly states that the bill is to be paid there only and "not elsewhere." It being conceded that the contract is to be governed entirely by English law and that no reference to Dutch law is relevant, the sole question which we have to decide is whether or not the acceptance of these bills was a local acceptance within the meaning of that provision of the Act. On the face of the bills, it clearly is not. It is an acceptance payable at a specified place, but there is no express statement that the bills are to be paid there only and not elsewhere. Accordingly, on the face of the bills, the argument advanced by the defendants cannot stand.

The defendants, however, point out that the bill is payable in Holland, whereas the defendants had their address stated on the face of the bill as in London, the drawers being in Poland. They contend that the fact that the currency in which the bill is payable is Dutch currency, coupled with the place of payment specified on the face of the bill, indicates that the parties intended that payment should be made only at the specified place. A reinforcement of that argument was based on the proposition that where the place of payment is specified by the drawer himself, as, apparently, it was in the present case, the drawers having typed it on the face of the bill before it was accepted, the position is somehow different from what it is when the acceptor specifies the place of payment when he accepts. It seems to me that there is nothing in this last point. The acceptor accepts the bill in the form in which it is presented to him, and the fact that the place of payment is already stated on it makes it none the less his contract of acceptance with that term as to payment in it. With regard to the location of the place of payment and the currency in which payment was to be made, it is, to my mind, hopeless to suggest that those facts can amount to the express statement which the section requires to make the acceptance a qualified and not a general one. When the section says: "unless it "expressly states that the bill is to be paid there only and "not elsewhere," I apprehend that it means what it says. It appears to me to be quite impossible to spell out of the matters on which reliance is placed any such express statement.

There is one minor point raised by the defendants which relates to interest. By the judgment, interest was awarded as from November 1, 1939, which was the due date. In fact the bills were only presented to the plaintiffs for acceptance in February, 1940, and it is said that the judgment is wrong in that it ought to have allowed interest only from February, 1940, and not from November 1, 1939. No such point was taken before the learned judge and, in my opinion, there is no substance in it. The defendants have had the use of the money since November 1, 1939, and it appears to me that the judgment was perfectly right in awarding interest as from that date. The appeal, accordingly, must be dismissed, with costs.

MacKinnon L.J. I agree. This is a very clear case, and its clarity is made possible by reason of the language of the Bills of Exchange Act, 1882, which I have always regarded as the best drafted Act of Parliament ever passed. It was admitted, because it could not be disputed, that this was a general acceptance within s. 19 of that code. By accepting the bill when it was presented to them, the defendants made a contract. They made that contract in London, where they signed their name. By s. 72, sub-s. 2: "Subject to the "provisions of this Act, the interpretation of the . . . . "acceptance . . . . of a bill is determined by the law of the "place where such contract is made"; that is, in the present case, by the law of England. There is a footnote in Chalmers on Bills of Exchange, 10th ed., p. 283, that the term "inter-"pretation" in this sub-section clearly includes the obligations of the parties as deduced from such interpretation. Therefore, the obligation of the defendants, who made their contract in London, depends on English law.

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MacKinnon L.J.

Only two other relevant sections show the obligation of the acceptor under English law. One is s. 52, sub-s. 1, which provides: "When a bill is accepted generally, presentment "for payment is not necessary in order to render the acceptor "liable." The other is s. 54, sub-s. 1, by which: "The "acceptor of a bill, by accepting it—(1.) engages that he will "pay it according to the tenor of his acceptance." It is, therefore, perfectly clear that the defendants were liable to pay this sum claimed.

This case is almost anticipated in precise terms by *Ex parte Hayward* (1). There bills of exchange drawn abroad, addressed to the proposed defendants, and stated to be payable in Ceylon, were accepted by the proposed defendants, payable at the Chartered Mercantile Bank, Kandy, but without the added limitation "but not elsewhere" or "only." It was, therefore, held that that was a general acceptance and that the defendants could be sued in London. The only conceivable difference between that case and the present is that the bills had been presented at the bank in Ceylon, named in the acceptance. That is an immaterial distinction and, if authority were necessary, that case would provide one to show that this decision of Tucker J. was correct.

As regards the interest, I agree with the Master of the Rolls.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Slaughter & May.*
Solicitors for defendants: *Herbert Smith & Co.*

(1) (1887) 3 T. L. R. 687.

H. L. L.

GIFFORD *v.* WHITTAKER.

1942
Mar. 17.

Motor car—Insecure load—Breach of regulation—Person "using" vehicle—Motor Vehicles (Construction and Use) Regulations, 1937 (*St. R. & O.* 1937, *p.* 2053), *regs.* 67 (2.), 94.

The appellant was the driver of a motor lorry owned by a limited company, which let it on hire to a firm of brewers. The lorry was loaded by experienced draymen, employed by the brewers, with empty barrels and cases of empty bottles. No ropes or other fastenings were provided or used either by the owners or hirers of the lorry, and the appellant took no part in the loading. The appellant, under the instructions of the head drayman, who, with others, accompanied the vehicle, then drove the lorry on a highway. In turning a sharp bend, one of the draymen overbalanced and fell off, dislodging a number of cases of bottles, which fell in the road. The appellant was charged under reg. 94 of the Motor Vehicles (Construction and Use) Regulations, 1937, that he, being a person using a motor vehicle on a road, unlawfully contravened reg. 67 (2.) by failing to have the load secured as that regulation requires. The justices convicted the appellant, but his appeal to quarter sessions was allowed. The respondent appealed:—

Held, by the Divisional Court, that the appellant, being the driver of the lorry, was a person using it within the meaning of the regulations, and that he was rightly convicted.

Semble, the person in charge of a vehicle, as well as the driver, may be a person using it.

Adair v. *Donaldson* 1935 S. C. (J.) 23 approved and followed.

CASE stated by Durham county quarter sessions.

The appellant, Richard Patrick Gifford, was convicted by Gateshead justices on an information preferred by the respondent, Superintendent Clayton Whittaker, alleging that he, on June 14, 1940, being a person using a certain motor vehicle on Fellside Road, Whickham, unlawfully contravened reg. 67 (2.) of the Motor Vehicles (Construction and Use) Regulations, 1937 (1), by failing to have the load carried by the vehicle so secured that danger was not likely to be caused to any person on the road by reason of the load or part thereof falling from the vehicle. The appellant was fined 1*l*. and appealed to quarter sessions, where the following facts were proved.

On June 14, 1940, the appellant was driving a motor lorry, as a servant of the owners, E. Robson (Gateshead), Ld., on the road leading from Burnopfield to Whickham, which is a road containing a number of bends. The lorry on that day was let on hire to John Rowell & Son, Ld., of Gateshead, brewers. The appellant was driving it under the instructions of one Nixon, who was in charge of the lorry and of other servants of John Rowell & Son, Ld. who were working in connection therewith and responsible to them for the loading thereof. The lorry was loaded with empty beer barrels and cases containing empty beer bottles by Nixon and two other experienced draymen, servants in the regular employment of John Rowell & Son, Ld., who were riding on the lorry as such servants to handle and deal with the property of John Rowell & Son, Ld. loaded on the lorry. The appellant had taken no part in the loading, or supervision of the loading, of the lorry. The lorry was a flat lorry with a beading round the edges, but without side boards, and no nets, ropes or other means were used to secure the barrels and cases thereon, nor were any nets, ropes, or other means provided either by the owners or hirers of the lorry. As the lorry was rounding a sharp bend, Nixon, who was sitting at the rear with his back to the side of the lorry, overbalanced and fell backwards off the lorry and in doing so grabbed the nearest box and brought ten to fifteen boxes containing empty bottles on to the road with him. He died as the result of his injuries.

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(1) The Motor Vehicles (Construction and Use) Regulations, 1937, reg. 67 (2.): "The load "carried by any vehicle shall be "so secured that danger is not "likely to be caused to any person "on a road by reason of the load "or any part thereof falling from "the vehicle."

Reg. 94: "If any person uses "or causes or permits to be used "on any road a motor vehicle ". . . . in contravention of or fails "to comply with any regulations "contained in Part III. of these "Regulations he shall for each "offence be liable to a fine not "exceeding twenty pounds."

These regulations were re-enacted in identical form, and with the same numbers, by the Motor Vehicles (Construction and Use) Regulations, 1941 (St. R. & O. 1941, No. 398).

Quarter sessions, without calling on the appellant, allowed the appeal on the grounds that the load carried by the vehicle had been loaded by experienced draymen, and that the appellant had taken no part in such loading; that the appellant was driving under the instructions of the servants of John Rowell & Son, Ld., and that he was not responsible in law under the regulations for having the load secured, but that the responsibility therefor rested on Nixon and the other servants of John Rowell & Son, Ld.

The respondent appealed by case stated.

E. G. Sykes for the respondent. The driver must be a "person using" the vehicle. In some cases, e.g. under reg. 75 referring to matters of annoyance, he is provided with a loophole, but in the case of regulations designed for safety, such as reg. 67 (2.), the obligation is absolute. There is no English authority in point, but the reasoning of *Adair* v. *Donaldson* (1) is applicable. Even if the appellant was

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(1) 1935 S. C. (J.) 23.

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not a " person using " the vehicle he was liable to conviction under the last words of reg. 94 for " failing to comply " with reg. 67 (2.).

J. Charlesworth for the appellant. The driver of a vehicle may be using it. If he is alone, probably he must be using it, but where, as here, there are other persons on the vehicle, the question which of them is using it for the purpose of the regulations is one of fact which quarter sessions have found, on sufficient evidence, in the appellant's favour. This court cannot disturb that finding. The regulations in several places distinguish between " driving " and " using " (see e.g. reg. 73) they cast specific obligations on drivers and persons in charge of vehicles (regs. 76, 77, 81, 82), but reg. 67 (2.) does not cast the burden on any named person, and reg. 94 is a general regulation, which does not define " person using." It must obviously be limited in some way, or every passenger on an omnibus—who is " using " the omnibus in a general sense—would be responsible for the observance of the regulations. Here the person using the lorry within the meaning of reg. 67 (2.) was Nixon, who had loaded it, and under whose instructions the appellant was. He referred to *Cockburn* v. *Gordon* (1).

VISCOUNT CALDECOTE C.J. The real question is whether the appellant was a person " using " the motor vehicle. Quarter sessions seem to have addressed their minds to the question whether he was the person responsible for seeing that the load on the vehicle was in the condition required by reg. 67 (2.). I think that Lord Hunter in *Adair* v. *Donaldson* (2) propounded the true question, when he said: "The question raised in the case is whether the "driver was using the motor vehicle on the road within "the meaning of the regulations." Mr. Charlesworth has argued that the word " uses " would, in its widest sense cover everybody who takes advantage of a vehicle as a means of transport, including, for example, passengers in an omnibus, but it was clearly not the intention of the legislature that such persons should be held to be " using " the vehicle within the meaning of the regulations. Therefore, he says, some restricted meaning for the word " user " must be found. It was then argued that only one person can be " using " the vehicle at the same time. The basis of that proposition is not

(1) 1928 S. C. (J.) 87.

(2) 1935 S. C. (J.) 23, 26.

very clear, but apparently the contention is that it is the person in charge of the lorry who uses it, and that the driver does not use it unless he is also the person in charge. These regulations deal separately with a number of matters and reg. 94 provides a penalty for breaches of any of them. Mr. Charlesworth has referred to a number of other regulations, and has invited the court to base some conclusions on the sense in which different words are used in different regulations. The word to be interpreted is the word " uses," but counsel called attention to the words " drives " or " is in charge of " in other regulations. Having suggested a particular interpretation of those words, he comes back to the word " uses," and contends that, on consideration of all the regulations, " uses " is only applicable to the person who is in fact in charge of the vehicle. The driver may, he says, be the user, if he is the only person on the vehicle, or if he is in fact in charge of it, but he is not necessarily so.

The question seems a very simple one. Here it is said that the only person using the vehicle was Nixon, the man who was killed, because there is a finding in the case that the appellant was driving under his instructions. In my opinion, giving the ordinary commonsense interpretation to reg. 94 I cannot arrive at any other conclusion than that one person using the vehicle in this case was, at any rate, the driver. It may be that the person in charge of the vehicle is a person using the vehicle, but that the person driving the vehicle is using it seems so plain as to make it unnecessary to look at other regulations to see whether they throw light on the question. In *Adair* v. *Donaldson* (1) Lord Hunter answered the question he propounded by saying that the driver "was the person who, at the time, was making use "of the motor-lorry on the road." That decision is not binding on this court, but, in my opinion, the arguments and conclusions of the court in that case were right and should be adopted here, although in this case there were several persons on the lorry, whereas in *Adair* v. *Donaldson* (1) the driver was the only person. It follows that the driver should have been held rightly convicted on the evidence, there being no question that reg. 67 (2.) had not been complied with. The appeal should be allowed with costs, the order of quarter sessions reversed, and the conviction restored.

(1) 1935 S. C. (J.) 23, 26.

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HUMPHREYS J. I agree.

SINGLETON J. I agree. I read the case stated as finding that the load carried by the lorry was not so secured as required by reg. 67 (2.). In other words, quarter sessions must be taken to have found that someone had committed an offence against that regulation. Reg. 94, the penalty regulation, also creates the offences of using or causing or permitting to be used on any road any vehicle in contravention of the regulations. It is argued that other persons, or another person, committed the offence with which the driver was charged. The persons who loaded the vehicle may well be said to have failed to comply with the regulations, and the person in charge of the lorry may well be said to have caused or permitted the offence, but I can see no finding of fact in the case which would justify anyone in saying that the driver of the lorry on the day in question was not using it. The use by the driver was an active use made by him of the vehicle and there is, in my opinion, nothing at all to take him out of the ordinary meaning of the word "use." It must be remembered that these regulations are drawn in the widest possible form so that there may be someone at hand on whom responsibility can be placed.

Appeal allowed.

Solicitor for respondent: *L. Mulcahy, Gateshead.*
Solicitors for appellant: *Molineux, McKeag & Cooper, Newcastle-on-Tyne.*

J. W. H.

1942
Mar. 26.

HUMPHREYS *v.* TYLER.

Emergency legislation—Billeting—Service of notice—Service on occupier by constable in presence of billeting officer—Validity—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 22 (1.).

Service of a billeting notice by a police constable on an occupier, in the presence and with the authority of the billeting officer, is good service.

Semble, such service, although not in the presence of the billeting officer, is also good.

CASE stated by Flint justices.

At a court of summary jurisdiction sitting on July 3, 1941, at Caergwrle, an information was preferred by the appellant, Superintendent C. J. Humphreys, against the respondent, Stanley Tyler, for that he being the occupier of certain premises had failed to comply with a billeting notice served on him by Howell Jones ("the billeting officer") contrary to the provisions of reg. 22 of the Defence (General) Regulations, 1939 (1).

On May 23, 1941, the billeting officer prepared a billeting notice addressed to the respondent and handed it to police-constable Morris for service on the respondent. Morris served the notice on the respondent in the presence of Howell Jones. It was contended for the respondent that there was no provision in the Defence (General) Regulations, 1939, giving authority to a police constable to serve the notice, and that the billeting officer had no power to authorize the police constable to do so. The justices being of opinion that the police constable had no power to serve the notice, dismissed the information, but stated this case.

Valentine Holmes for the appellant. The contention for the respondent overlooks the fact that it is the billeting officer who decides on the suitability of any premises for billeting, which a constable cannot do, and that, therefore, the service of the notice must be the service of the billeting officer, although performed by a constable. This was a good service: qui facit per alium facit per se. The justices were thinking of the service of a summons or writ, but this was not a service of a document issued against the respondent, but only that of a notice to him.

The respondent was not represented.

VISCOUNT CALDECOTE C.J. The mere statement of the facts and of the point taken by the respondent is enough to show that his case is singularly devoid of merits. The Defence (General) Regulations, 1939, are intended to provide for circumstances and emergencies arising out of the defence of the realm, and the provision of billeting facilities is one of the necessary

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(1) By reg. 22 (1.): "Any "person acting under the author- "ity of the Minister of Health "or the Commissioners of Works "may serve upon the occupier of "any premises a written notice "(hereinafter referred to as 'a "'billeting notice')" (3.) ".... "Any person having power to "serve a billeting notice is herein- "after referred to as 'a billeting "'officer'."

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steps taken to safeguard people, chiefly children, who would otherwise be exposed to risk of death or injury. There is no doubt whatever that the billeting notice was properly served on the respondent for the simple reason that the constable who in fact handed the notice to the respondent was authorized to do so by the billeting officer. In other words he was deputed by the billeting officer to serve the notice. I cannot see why it should be said that that is not service by the billeting officer. It is self-evident that it could not have been the intention of the regulation to require a billeting officer personally to serve these notices if everything necessary was done to put the notice into the hands of the person to be served. Here the constable, expressly authorized by the billeting officer and in the presence of the latter, put the notice into the hands of the respondent. The point taken by the respondent was a bad point, and the appeal must be allowed.

We have been asked by Mr. Holmes to say whether we will consider making any observation on the question whether the service is bad or not according to whether or not it is served in the presence of the billeting officer. Any such observation must be obiter dictum, but, providing the billeting officer has authority to act as a billeting officer, I can see no reason why he should not authorize some person to serve the notice even though he is not present at the time of service.

HUMPHREYS J. I agree with the judgment of my Lord and with the observation he has just made, although it may be described as obiter dictum.

SINGLETON J. I agree.

Appeal allowed.

Solicitors for appellant: *Maples, Teesdale & Co.*

W. L. L. B.

RODGER *v.* VAREY.

1942
Mar. 26.

Emergency legislation—Billeting—Care of child—"Child"—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 22 (II.).

A girl of fourteen years of age is a "child" within the meaning of reg. 22 (II.) of the Defence (General) Regulations, 1939, and, therefore, it is the duty of an occupier of premises on whom such a girl is billeted to care for her to the best of his ability.

CASE stated by justices.

At a court of summary jurisdiction sitting at Chapel-en-le-Frith an information was preferred by the appellant, James Coghill Rodger, against the respondent, Francis Joseph Varey, under reg. 22 (II.) of the Defence (General) Regulations, 1939 (1), for that he between April 29 and June 13, 1941, unlawfully did fail to comply with a billeting notice duly served by Reginald Tomlinson, a billeting officer acting under the authority of the Minister of Health, in that he did not care for a child specified in that notice to the best of his ability.

The appellant was the superintendent of police for the Chapel-en-le-Frith division. The person specified in the notice was Rita Waltham, who was fourteen years of age on December 21, 1940. The respondent contended that she was not a "child" within the meaning of reg. 22 (II.). The meaning of "child" in the Education Acts, the Public Health Act, 1936, the Children Act, 1908, and the Children and Young Persons Act, 1938, was discussed. The justices, being of opinion that Rita Waltham was not a "child" under any statutory definition cited to them, dismissed the information, but stated this case. They gave no finding whether in fact the respondent was guilty of want of care.

Valentine Holmes for the appellant. If this is a question of law and not of fact, a person is a "child" up to the age of twenty-one. The meaning of child in other enactments is irrelevant. No statutory definition is required. In ordinary English this girl was clearly a "child." [The Billeting Order, 1940 (St. R. & O. 1940, No. 813), para. 2, was referred to.]

The respondent was not represented.

VISCOUNT CALDECOTE C.J. The matter for our decision lies in a very small compass. This regulation dealing with billeting is not framed in highly technical language, no doubt partly because it is intended to be understood by people who will be thereby required to perform a duty arising out of the

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(1) By Defence (General) Regulations, 1939, reg. 22 (II.): ". . . . it shall be the duty of "the occupier of any premises in "which accommodation for any "child not accompanied by a "person otherwise responsible for "his care is so furnished as afore-"said to care for the child to the "best of the occupier's ability."

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war, and will for that reason not wish to raise legal questions. In my view, the point taken by the justices is bad. They came to the conclusion, judging from their finding, that before they could find that a girl of fourteen years of age was a "child" within the meaning of reg. 22 (II.), it was necessary to have some statutory definition making her a child. I think that no statutory definition was necessary to cover such a case as this. In the ordinary use of the English language, a person of fourteen years of age is a child. Everybody would understand him or her to be a child, and to find to the contrary seems to me perverse. A girl of fourteen is so plainly, in my opinion, a child that it is not open to justices to hold otherwise.

We have been invited to go beyond what is necessary for the decision of the point which is raised and to express some opinion as to when a person ceases to be a child. I do not propose to embark on that voyage. It might take one into very remote places. I believe, as I have said in the course of the argument, that in general it will not be found that either the parties concerned or justices will come to anything but common sense decisions in applying the provisions of this regulation. The case must go back to the justices for hearing and decision, taking into account the expression of our opinion.

HUMPHREYS J. I agree.

SINGLETON J. I agree.

Appeal allowed.

Solicitors for appellant: *Cooper, Sons & Co., Buxton.*

W. L. L. B.

END OF VOL. I.

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